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TRANSCENDENT JUSTICE / *The Religious Dimension of Constitutionalism*

Carl J. Friedrich

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To my brother Wolfgang Friedrich
Preacher of Justice

Judge not, that ye be not judged.

Foreword

The theory and practice of constitutional government probably constitute the greatest political achievement of the Western World. It is an achievement not of one century nor of one nationality. We may hope, without trace of chauvinistic pride, therefore, that this political achievement may be a permanent legacy to all of mankind. Does constitutional government, however, presuppose the existence of a religious and philosophical consensus? Can constitutional government survive the demise of a religious and philosophical orientation that originally nurtured its growth? To evaluate the prospects of constitutional government it is essential that we have an understanding of the intellectual climate out of which it emerged and of how that climate has changed.

Few persons are as competent to undertake this inquiry as the author of this book, for he has devoted a lifetime of scholarship to the study of both the philosophy and practice of constitutional government. Eaton Professor of the Science of Government at Harvard University, Carl J. Friedrich is also Professor of Political Science at the University of Heidelberg. Born and educated in Germany, Professor Friedrich has been teaching at Harvard since 1926. In his teaching and writing he has served as a bridge between the cultures of two continents, explaining the one to the other and utilizing the intellectual resources of both. He has contributed significantly to the development of political science as an intellectual discipline and recently served as President of the American Political Science Association. He was one of the founders of the American Society for Political and Legal Philosophy and is the editor of that Society's annual

publication, *Nomos*. His publications are numerous and include *Constitutional Government and Democracy: Theory and Practice in Europe and America* (1937, rev. ed. 1941); *The New Belief in the Common Man* (1941); *Inevitable Peace* (1948); *The Philosophy of Kant* (1949); *Totalitarian Dictatorship and Autocracy*, with Z. K. Brzezinski (1956); *Constitutional Reason of State* (1957); *The Philosophy of Law in Historical Perspective* (1958); and *Man and His Government* (1963).

The present book represents an expansion and revision of three public lectures that Professor Friedrich delivered at Duke University during the spring of 1963 under the auspices of the Lilly Endowment Research Program in Christianity and Politics. Chapter V is a revision of Professor Friedrich's presidential address to the American Political Science Association in September, 1963, and is reproduced here by permission of the *American Political Science Review*. It should be understood that although publication of this book was made possible by funds provided by Lilly Endowment, Inc., the Endowment is not the author or publisher and is not to be understood as necessarily approving, by virtue of its grant, any of the views expressed in the pages that follow.

John H. Hallowell, *Director*

Lilly Endowment Research Program
in Christianity and Politics

Table of Contents

Chapter One

THE PROBLEM OF THE RELIGIOUS FOUNDATIONS OF CONSTITUTIONALISM

3

Chapter Two

MEDIEVAL CONSTITUTIONALISM

21

Chapter Three

PROTESTANT CONSTITUTIONALISM

45

Chapter Four

DEIST AND THEIST CONSTITUTIONALISM

68

Chapter Five

RIGHTS, LIBERTIES, FREEDOMS: THE HUMANIST CORE OF CONSTITUTIONALISM

92

TRANSCENDENT JUSTICE

Chapter One

THE PROBLEM OF THE RELIGIOUS FOUNDATIONS OF CONSTITUTIONALISM

Wherever new nations emerge, wherever old nations renew themselves, in India and Italy, in Nigeria and France, new constitutions are the order of the day. Whenever a revolution is successfully consummated, even a Communist revolution, a constitution is issued. Even beyond the sphere of the national order, regional unions and the world-wide United Nations seek to fashion a charter or constitution. Should a constitution be difficult to agree upon, those in power at least promise to make one as soon as feasible. And yet, many of the constitutions are feeble and ineffectual, subject to rapid evolution, if not to replacement by yet another one. Constitutionalism, in spite of its world-wide appeal, seems to be lacking some of its firm foundation, the stable self-confidence of former days. Why do constitutions encounter so many difficulties, engender so many tensions and troubles? In order to understand and possibly to answer this question, it is necessary to inquire into the origin of constitutionalism. It must be understood as embedded in the belief system of Western Christianity and the political thought that expresses its implications for the secular order. Patently, many of the communities that have adopted constitutions in this century (or had them imposed upon them by well-intentioned benefactors, both domestic and foreign) are not Christian communities. Also those communities that once were Christian

have seen their religious moorings increasingly weakened by modern thought. How far removed from seventeenth-century England is the contemporary mood in that country which begot the "mother of parliaments!"

In asserting that Western constitutionalism is part of Christian culture we are, of course, following a contemporary belief that all cultural manifestations should be seen as emanations of an interrelated system of values, interests, and beliefs. The truth of this proposition leads readily to the untruth of a relativism that would restrict the values, institutions, and behavior patterns to a particular system, and hence make them unavailable beyond its confines. I do not subscribe to such parochialism, but recognize the underlying recurrency of phenomena in many contexts, and hence the universal potentiality of man *qua* man.[1] In other words, by developing the cultural and ideational context of constitutionalism, I do not wish to exclude the possibility of its universal validity, but merely to point up the problem that such extension of its use may present, when those values and beliefs that were associated with its origin no longer can be counted upon to provide its underpinnings.

But, it may at once be objected, do not the roots of constitutionalism extend much further? Do they not reach back into classical antiquity and have their true foundation in Greece and Rome? Since it is widely believed that this is indeed true, a brief exploration of this position must precede our analysis.[2] Such an exploration will serve the further purpose of introducing the issue of justice that I am making the central focus of this study of constitutionalism.

Plato in his immortal dialogue about the just has Socrates

1. See my *Man and His Government* (1963), especially the Introduction and chaps. i and ii.

2. See for a persuasive and influential statement Charles Howard McIlwain, *Constitutionalism—Ancient and Modern* (1940). He stated there that he was increasingly "impressed with the significance and importance of the Republican Constitution of Rome" (p. 43).

conclude that justice (*dikaiosyne*) would be granted to be "properly having and doing what is one's own"—for oneself and one's household ("he tou oikeiou te kai heautou hexis te kai praxis").[3] The statement refers to the role and function of each of the three classes and therefore relates justice to the fixed and hierarchical order of the community. It also stresses action as well as possession. It was echoed in the third phrase of the famous Roman (Stoic) definition of the natural law: *suum cuique tribuere*. But in this form it has become a passive acceptance of the other's "own," leaving open the question of whether it is a matter of actions or possessions. Plato, on the other hand, in this and related passages, speaks of justice (*dikaiosyne*) as both a personal quality and a quality of acts and things. The question of whether persons, acts, or things can be adjudged "just" or, more correctly speaking, "righteous" (*dike* meaning right, that is the sense of basic custom and law) can be answered only by him who has had the vision of the *eidos*, the idea in the sense of quintessential form in its relation to the idea of the good; for only he can know how far any particular person, act, or thing partakes (*metechei*) of the *eidos*. The *eidos* of justice is a transcendent reality, something that exists beyond the testimony of the senses. For Plato, this transcendency calls for the seeker after wisdom (*philosophos*) who, when he has succeeded in his search and has become a knower, is the only one capable of ruling. The very transcendency of justice precludes its realization in a constitutional order.[4]

3. *Republic* 433e. This crucial phrase has been rendered in a variety of ways. Cornford puts it thus: "Justice means that a man should possess and concern himself with what properly belongs to him." A. D. Lindsay has "the possession and practice of what belongs to us and is our own," but neither seem to me really to be an improvement over Jowett's classical "having and doing what is a man's own, and belongs to him."

4. The point was firmly stated by Glenn R. Morrow, *Plato's Cretan City* (1960), p. 232: "...we must remember that constitutional law, in the continental and the American sense of the term, was unknown at Athens...."

But what about the *Laws*? Are there not laws and, in fact, a constitution in this later dialogue of Plato? Laws there certainly are, but not a constitution in the distinctive sense that Western tradition has developed. Even if we reject, as I do, the notion that Plato's *Laws* expound a totalitarian order,[5] they certainly delineate an authoritarian one in which the individual has no rights, but is strictly confined by the laws. Indeed, the very core notion of human rights, namely the right to one's religious conviction (see below, chapter V), is explicitly excluded by the notion of strictest conformity to the established belief system as the very essence of a just political order.[6]

Such a notion is, however, very much in keeping with views prevailing in classical Greece. Religion was intimately bound up with the political order; indeed, no such entity as a "state" separated from a "church" was recognized. The *polis* of which Plato and Aristotle thought when discussing *ta politica* was a church as much as a state and in fact, therefore, neither. It seems in keeping with this general view of politics that Plato and Aristotle should have thought that every political order had its "constitution," its *politeia* or *politeuma*. For the latter simply means that a constitution is identified with the political order or structure and comprises the congeries of parts of which it consists. Even a totalitarian dictatorship has *such* a "constitution," namely the office of the dictator, and such structures as he may deem satisfactory for the time being, a Politbureau, a Presidium,

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He then elaborates by citing the various boards and other offices and indicating the lack of a clear delimitation of their respective powers and functions. This is true enough; but what is even more significant is the complete absence of any protection of the citizen in his private sphere, as was stressed by Fustel de Coulanges and Carl Burckhardt in their classic studies.

5. Cf., e.g., Karl Popper, *The Open Society and Its Enemies,* (1940). A convenient selection from this and other works concerned with this problem is now offered in Thomas L. Thorson, *Plato:Totalitarian or Democrat?* (1963)—but the alternative here suggested is a false one. For a balanced statement, see Morrow, *op. cit.,* p. 279.

6. *Laws* 907d-910d.

a territorial decentralization ("Federalism"), and the like. It is apparent that the term constitution in this sense has no differentiating pluralistic significance; it is a pleonasm, a synonym for regime or political structure.

But there is, clearly, another and normative sense in which Aristotle uses the term *politeia.* For it also designates his model political order, which has been, in particular, called a "polity" or constitutional regime.[7] It would lead too far to attempt here a delineation of that model. Suffice it to say that it is not characterized by any concern with human rights, except those rights that pertain to participation in politics. It is a composite "constitution" in the broad Aristotelian sense of being a compound of the three good forms of government, and as such has Platonic antecedents. We shall later on encounter the mixed constitution again (see chapter III); it undoubtedly has played its part in the evolution of modern constitutionalism. Here what matters is that this model was not at all the model of a modern constitution. Not only was there no stress on human rights, as just mentioned, but there was no correlative concern with the need for restraining the exercise of power. The standard for its "goodness" was its stability, or if one prefers, its durability, that is to say, its effectiveness in maintaining the particular values and beliefs intact. To put it another way, the survival of the regime, rather than the dignity and freedom of those composing it, was the standard by which *its* worth was determined. By organizing a "middle road" of balanced and harmonious relationships it achieved justice, itself defined in terms of the values and beliefs of the community as a careful system of proportional as well as arithmetic equality.

7. E.g., 1279 a & b, 1293 a & b; this constitutional government is apparently also recognized as recurrently appearing in Greek *poleis.* But in order to be "perfect," it presupposes virtuous citizens, and hence Aristotle's *Politics* culminates in a discussion of *paideia,* or *formation* as the French call it, by which the citizens are molded.

In short, the *politeia* of Aristotle even in its normative conception as a model political order lacks its specific modern connotation: the exclusion of the government from a personal sphere and more specifically from the sphere of religion. This lack was equally noteworthy in the Roman tradition. When Polybius wrote his celebrated analysis of the Roman Republic, the excellence of its fabric seemed to this Greek to lie in its religious orthodoxy and its careful balancing of political forces.[8] But was not the Roman Republican order a most elaborate system of regularized restraint, just the same? It most assuredly carried regular restraint to an extreme in the splitting of the chief executive; few if any political regimes have followed Rome in this arrangement of two consuls at the head of the state. The complex system of interlocking executive and administrative bodies and functionaries, the division of rule-making power and the elaborately balanced exercise of judicial functions[9]—all these constitute certainly a system of regularized restraint. But the ground for Polybius' admiration was the basic achievement of this constitution. It was not the protection of the person; for such did not exist, except in a limited procedural sense. Rather it was to make Rome strong and to provide the Roman soldier-citizen with effective participation in its affairs. Roman "constitutionalism," if that term be allowed, was not pluralistic. It rested upon a pagan evaluation of human life in terms of *virtus*, and such *virtus* or manliness was understood as predominance on the battlefield and in the market place of political rivalry. According to the theory of the Roman *civitas* the people, and the peo-

8. Note especially the emphasis on the *jus imaginum*, *Historia*, VI, 53; the central significance of this religious aspect has been stressed by Eberhard F. Bruck, *Ueber Roemisches Recht im Rahmen der Kulturgeschichte* (1954), pp. 1 ff.

9. The most impressive description of this variegated mosaic is still Theodor Mommsen's great *Roemisches Staatsrecht* (1871 and later); in spite of the datedness of much detail, it remains a monument to institutional analysis.

ple alone, are the source of all law. Therefore an understanding of the essential spirit of Roman constitutionalism does indeed presuppose an insight into their view of law (*lex*).[10] But that law became also the law of the empire, not only while it still was maintaining a facade of the old constitutionalism, but also after it was allowed to fade.[11] This persistence of the law was possible, because that law was oriented toward and preoccupied with the political order, rather than with the persons composing it. Now it might be said that the Roman law continued even beyond the break-up of the Empire, and that is true—but only to a limited extent. More particularly those parts of the law most closely linked to the religion of Rome (as typical *polis*) have been abandoned, as they were already toned down when the Roman law was codified under a Christian emperor. Yet "we cannot alter the fact that by necessity and by choice the law of the Roman empire has played a great part in the formation of our civilization."[12] Not the least of these was the principle of the importance of law for government.

An examination of the Ciceronian position confirms what has just been stated. In his discussion of the commonwealth (*res publica*) Cicero asserts that such a commonwealth is, as the people's own, based upon a people, and such a people is in turn defined as an "assemblage of a multitude" which is "associated" by the consensus on law and the sharing of useful things (*"coetus multitudinis juris consensu et utilitatis communione sociatus"*); a little further on the law is described as the bond of society (*vinculum sociatatis*).[13] In a separate treatise, Cicero elaborated the importance of law,

10. McIlwain, *op. cit.*, p. 48, basing his analysis upon Rudolf von Ihering's *Der Geist des Roemischen Rechts* (1866-1871).

11. See for this transformation *inter alias* the study by Sir Ronald Syme, *The Roman Revolution* (1939, 1960).

12. F. de Zulueta, "The Science of Law," in *The Heritage of Rome*, ed. Cyril Bailey (1924), p. 174.

13. *De Republica* I. 25, 32; cf. the discussion below of St. Augustine's rejection of this "definition" or rather characterization.

and here he insisted upon the paramount importance of the law without which a commonwealth cannot exist.[14] It is for this reason in the first place that Cicero believed that *civitas* to be best in which the three forms of government he has previously been examining (monarchy, aristocracy, and democracy) are conjoined; he speaks of a conjoined kind of *civitas* (*conjunctum civitatis genus*), which has been spoken of as the mixed or composite commonwealth or state.[15] It is praised precisely because it provides stability; having pointed out the constant revolutions and overturns in the other forms, Scipio remarks that to avoid them he considers a fourth form most commendable, which is "a moderated [balanced] mixture of the other three." This is claimed to be the constitution of the Roman *civitas*, as it had been that of Sparta and Carthage. Never is there any mention of the rights of citizens, except in terms of participation in the affairs of the commonwealth, and in the mutual protection of their legal rights. Nor could there be any such, considering the political basis of values, including those of religion.

In short, the conceding of an elaborate system of a mixed form of government, blending monarchical, aristocratic, and democratic elements, does not exclude an insistence upon our central contention, namely, that the basic function of the Roman constitution was diametrically opposed to the function of constitutionalism in the Christian tradition. For in this tradition the law and the justice upon which such law rests are not primarily a matter of will, whether of the people or of the emperor: they can only be realized and understood, if the sanctity of the divine person and the dignity of his human counterpart and creation are served by it. The substance of human justice is seen as in a mirror in

14. *De Legibus* I. 4, 14 and II. 5, 12.

15. Cf. the Introduction to the edition of Cicero's *Commonwealth* by George Holland Sabine and Stanley Barney Smith (1929). Cf. *De Republica* III. 13, as well as I. 29 (from which the quotation that follws is taken); cf. also II. 23-24.

the divine justice that is a mystery only partially revealed to mortal man. In a sense, it is the Platonic idea, but in a religious garb: revealed rather than seen in philosophic vision.

Among the fathers of the Church, it was Saint Augustine who explicated this position most elaborately, perhaps because of the depth of his involvement both in the Roman tradition and Platonic philosophy.[16] His "pessimistic" conception of government and the political order is the logical as well as the spiritual consequence of Augustine's insistence upon the utter transcendence of true justice. Such true justice is attainable by the faithful only with the aid of divine grace, and can never be found in any earthly commonwealth, whether Christian or non-Christian. Desirable as it may be that the rulers be Christian and pious men, the main purpose of the *civitas terrena,* the earthly city, is order and peace, and the laws promulgated in the service of these paramount goals must be obeyed by all Christians, regardless of their rightness. For even the best laws are only "vestiges," or "images" of the true justice found only in the City of God which is not of this world.

That no secular political order could possibly be an order of true justice was a proposition of most urgent concern to Saint Augustine. As a Roman, he found himself confronted with the imposing tradition of the Roman law, basic to the Republic, as we have seen, and continued by the Empire after the "constitutional" order of the Republic had dis-

16. For this see Henri-Irénée Marrou, *Saint Augustine et la Fin de la Culture Antique* (1938) especially Part I. The Roman aspect is put into the perspective of other fathers, especially Tertullian, by Edgar Salin, *Civitas Dei* (1926). Note especially the statement on p. 103, cited from Tertullian: "Der Glaube ist in der Glaubensregel niedergelegt; er umschliesst das Gesetz und mit der Beobachting des Gesetzes das Heil," and commented on as a "scharfe Betonung des Gesetzes-Charakters der Lehre." For a more recent discussion, see Herbert A. Deane, *The Political and Social Ideas of Saint Augustine* (1936), chaps. iii and iv, who elaborates with impressive learning the position stated in Carl J. Friedrich, *The Philosophy of Law in Historical Perspective* (1958; 1963), chap. v, which the text above follows.

integrated. The greatest philosophical interpreter of this tradition was Cicero, and it is therefore not surprising that Saint Augustine should take great pains to deal with and reject the Ciceronian position. Cicero's conception of the *respublica* as outlined above laid major stress upon the *consensus juris* as the bond that held a people and its society together. But since *jus* is based upon justice (*justitia*) and justice is giving everyone what is due him, how could Rome, or indeed any other pagan commonwealth, possibly be based on justice? For is not the most important among those to whom one must give his due the immortal God? And did not the Romans worship "demons" rather than this one and only God? Even in a political order in which there are Christians among rulers and ruled, only a limited number will be inclined to give God his due, and even these are unable to do more than try, requiring divine grace and help to achieve true justice.

Saint Augustine takes pain to restate the Ciceronian position in terms of a new "definition" of the people who constitute a commonwealth. Such a people is "an assemblage of a reasonable multitude which is associated by the sharing in concord of the things it cherishes [loves]."[17] Put into modern words, what Saint Augustine seems to be saying here is that the consensus is on earthly values rather than on (true) justice. The commonwealth, then, is a community of *shared* values rather than divinely *revealed* ones. The great bishop of Hippo as a good Roman finds it inconvenient, he says, to deny the name of *respublica* to the Roman Republic as he would have to do if the *consensus juris* were made the

17. *Civitas Dei* XIX. 24: "*res publica est res populi . . . populus est coetus multitudinis rationalis rerum quas diligit concordi communione sociatus.*" As I pointed out, *loc. cit.* p. 36, "it is possible to question how far this expression *diligere* is identical with the Christian concept of love or charity. But in view of the term *dilectio proximi*, or "love of neighbor," it seems probable that Augustine intended to transform or reinterpret in a Christian sense the pagan concept of the legal community as found in Cicero." Hereafter the word "love" will be used, because of its conventional prevalence.

prime characteristic of such a *respublica.* At the same time, he seems interested in retaining the contrast between such a *respublica* which is *res populi,* that is to say a political order that "belongs" to the people, and a *regnum* that does not. For such *regna* he, in a famous analogy, compares to robber bands.[18] While the contrast ought not to be overstressed, there is little doubt that Augustine would not have suggested such an analogy between republics and bands of robbers, for in the remainder of the argument he relates the origin and growth of kingdoms to the origin and growth of gangs of robbers, and a pejorative contrast between monarchical and republican rule was in the Roman tradition. Several passages in Saint Augustine show that he thought more highly of the old republic and its virtue, though of course he never admits that such *virtus* was true virtue. Nor is it permissible to make this distinction the basis of asserting that Saint Augustine really looked upon the *respublica* as the model political order.[19] That order is the *Civitas Dei. Civitas* is the broad generic term which means political order or community (state) of which there were several kinds, *respublicae, regna, imperia.* Some of these achieved a considerable degree of goodness; *regna* and *imperia* through good rulers, *respublicae* through good laws.[20]

There is nowhere any indication that Saint Augustine necessarily preferred one of these orders to another, since none of them could achieve true justice. It was a question of what order would be effective in maintaining peace and

18. *Civitas Dei* IV. 1: "*Remota itaque justitia quid sunt regna nisi magna latrocinia? quia et latrocinia quid sunt nisi parva regna?*"

19. This is the position that Charles H. McIlwain, *The Growth of Political Thought in the West* (1932), pp. 154 ff. developed and that Deane, *op. cit.*, pp. 120 ff. carefully and convincingly refutes. He fails, however, fully to recognize the distinction between *regnum* and *respublica.*

20. Deane, *op. cit.*, p. 297 n. 24, cites an interesting passage from a letter of St. Augustine: "God showed in the rich and far-famed Roman Empire how much can be achieved by civic virtues without true religion. . . ." Ep. CXXXXVII, III. 17.

order. Like most patristic writers, he tended to accept the existing conditions of state and law. Bad emperors were a scourge laid upon men for their sins, as were all other trials and tribulations. Although the ultimate measuring rod for such an assessment was the true justice which the church was called upon to guard, it does not seem that Saint Augustine ever thought of the possibility of using this transcendent justice as the organizing principle for political improvement. Indeed, he expressly forbids it. Christians must not resist bad rulers, but obey. If such a ruler commands what is contrary to God's commandments, they are of course obliged to obey God; yet such obedience can imply only passive resistance, never active concern for the reform of the political order. Laws ought to conform to the requirements of true justice, but they often do not. In a strict sense, such laws as fail to conform are not truly laws. He states this very explicitly not only in some early writings, but also in the *Civitas Dei*: "It seems to me that that which would not be just is not law."[21] Yet, Saint Augustine, dialectician that he was, is fully cognizant of the fact that ordinary positive law (*lex temporalis*) does not punish sin, but merely the violation of the order of peace of a particular rule. The coercive power of positive law therefore was interpreted by Augustine in the Roman tradition. His is really a transcendentalized version of Cicero's Stoic doctrine of the rational natural law which is not "thought up by men," i.e., a product of human

21. XIX. 21: "*Mihi lex esse non videtur, quae justa non fuerit.*" This is the one point on which I sharply disagree with Deane, who as far as I can see misses the point by stressing "validity." He writes (*op. cit.*, p. 90) that "as far as I have been able to discover in none of the works written during the remaining forty years of his life does Augustine ever state that positive law must conform to God's eternal law or to the law of nature if it is to be valid." I agree; but just as Augustine distinguishes between a "true justice" and images thereof (as I read him, one might say the distinction is that between "full" justice and "partial" justice), so he also distinguishes between "true law" and the operative and valid rules which sinful men call law, because without them order and peace cannot be maintained. Cf. my *Philosophy of Law in Historical Perspective*, p. 39.

invention,[22] but "something eternal which rules the entire world by the wisdom of what it commands and forbids." For Cicero, too, had held that that is not truly law which contravenes the law of nature. But for him the law of nature was immanent to man, and as he put it: "we are born for justice, and law is not based upon opinion but upon the very nature of man." Hence there are differences between forms of government that matter, and there is a "best" form of government in which such law is actualized and true justice is achieved, whereas the Augustinian conception of a transcendent justice excluded such concretization.

Such a view of justice transcends in its higher source of authority all the strictly political arguments related to the functioning of the political order. It thereby frees the inquiry into ordinary, temporal justice of the philosophical uncertainties which had plagued a Plato, and enables the inquirer to ask merely the question: what particular act or complex of acts and/or events are recurrent in all politics, what concrete political experience is meant when people speak of justice and injustice?[23] That concrete experience appears to call for comparative evaluation of persons and situations. Such evaluation seeks to determine the appropriateness of an action by relating it to the persons affected by it. It asks: Are they equal and in what way? The answer is cast in terms of the prevalent values and beliefs of the particular community. But this question, when asked in regard to a Christian community, raises in a new and insistent form the problem which Saint Augustine had sought to transcend: What are the specific grounds for value judgments which, by

22. Cicero, *De Legibus*, II, 4—the Latin phrase is "*lex non hominum ingeniis excogitata.*" The next quotation *ibid.* For further detail, see my *Philosophy of Law in Historical Perspective*, chap. iv.

23. For a detailed treatment of this question see my paper: "Justice: the Just Political Act" in *Nomos* VI (1963), ed. Friedrich and Chapman, as well as chap. xv of *Man and His Government* (1963), where the problem is put into the broader context of general political theory.

determining the idea of Christian justice in the temporal order, shape any notions of a *right* political order, which more specifically might lead to the conclusion that only a constitutional order in the specific Western sense can be the right order for a Christian Community? It is a question which Saint Augustine neither asked nor answered, but which Saint Thomas and other medieval thinkers faced and sought to deal with. The answers which they found or believed themselves to have found do not exclude, of course, the possibility that other than Christian values might serve as a similar foundation. But in any case they need to be identified before a search for such analogues can become meaningful.

These questions bring the discussion back once more to the specific Western form of constitutionalism. There has been occasion in the preceding analysis to hint at its distinctive features, but they ought now to be pulled together and made more explicit.[24] At the outset, let it be said that the politically significant aspect of such a constitution is neither that it is embodied in a single document or code, nor that it provides for the organization of the government. The latter conception would mean, of course, that any government, no matter what its form, had a constitution. Finally, it may be observed that the constitution is not "basic law" in the sense of incorporating the basic legal rules of a particular community; many fundamental rules of private and criminal law have no place in the constitution.

The true nature of a constitution and of constitutionalism, its *differentia specifica* by which it contrasts with all non-constitutional regimes, is discovered by asking: What is the political function of a constitution? For its function is to realize specific political objectives. Among these the core ob-

24. The statement here given is in line with my analysis in *Constitutional Government and Democracy* (1937, 1950), Part II, but more especially chaps. vii-ix, as revised and restated in "Constitutionalism" in the *International Encyclopedia of the Social Sciences* and provided with a framework of general theory in *Man and His Government* (1963), chap. xv.

jective is that of safeguarding each member of the political community as a political person, possessing a sphere of genuine autonomy. The constitution is meant to protect the *self* in its dignity and worth; for the self is believed to be primary and of penultimate value. This preoccupation with the self, rooted in Christian beliefs as discussed above, eventually gave rise to the notion of rights which were thought to be natural. Hence the function of the constitution may also be stated as that of defining and maintaining human rights. Among these rights that of each person's religious conviction was and is as crucial in the spiritual sphere as the right of private property was and remains in the material sphere (see below, chapter V, for an elaboration). But both these rights have undergone significant transformations, as there has generally been much variation in them, but what has persisted throughout the history of Western constitutionalism is the notion that the individual human being is of paramount worth and should be protected against the interference of his ruler, be he a prince, a party, or a popular majority.

The prime function of a constitutional political order has been and is being accomplished by means of a system of regularized restraints imposed upon those who exercise political power. The division and separation of powers, epitomized in the doctrine of "checks and balances," was discovered to be the effective way of organizing regularized restraints. Such division and separation might be functional, e.g., a division into legislative, executive, and judicial functions, or it might be spatial or territorial as in federalism and in constitutionally guaranteed local self-government. Such division and separation never "stays put," but continually evolves in response to the transformations occurring in society; the constitution, or, if one prefers, constitutionalism, is in fact a continuing process. Any particular pattern or de-

sign is merely a way station, comparable to the pattern any organic entity presents at a particular moment in its life-cycle.[25]

But since a constitutional regime must fulfil the basic function of providing for effective government, such regularized restraint must itself be carefully limited to the essential. In contrast to earlier constitutionalism, modern constitutionalism has increasingly recognized the role of parties as the integrators of a system of regularized restraints. At the same time, and in order to avoid the risk that such a party might in turn render nugatory the restraints under which its leaders were to exercise public office, it has sought to insure the fairly regular alternation of such parties through the explicit recognition of the role of an opposition. All these are familiar points, and they are mentioned here only as reminders of what constitutes modern Western constitutionalism. The deep concern over the establishment of one-party systems in a number of new nations—justified though it be in the name of "democracy"—is well-grounded in the tradition of constitutionalism; as long as minor parties are permitted to operate as effective critics of the government, such a one-party system may be feasible as a marginal constitutional order.

A constitutional government has, like all governments, to be founded and brought into being. That constituent task can be accomplished only by a group (or occasionally by an individual) that possesses actual power. Evidently, such a founding act calls for abdication by the power wielders. In this abdication lies the prime difficulty of constitutionalism. It is unnatural for men who wield effective power to surrender it. For such an extraordinary act to take place, a profound conviction is needed. Solon, after reorganizing the

25. I have developed the notion of constitutional process in particular application to one of its features, federalism, in a paper contributed to *Systems of Integrating the International Community*, ed. Plischke (1964).

Athenian *polis,* departed on a long journey. His was a negative conviction, namely his dislike for tyranny; evidently his leadership was so prepotent that he feared being a tyrant *malgré lui.* This act of self-abnegation was celebrated throughout antiquity as a most extraordinary sign of Solon's wisdom. The balancing of classes which his "constitution" sought to accomplish was undertaken, however, in the hope of achieving a *stable* order, rather than a constitutional one, in the modern sense.[26] Stability, peace, and order are, however, objectives of all government, and a good argument can be made and, of course, has been made in support of the contention that traditional monarchy rather than constitutionalism provides the greatest degree of stability, peace, and order. The search for a modern constitutional order is comprehensible only when the willingness of the founders of such regimes to surrender their sovereign power and content themselves with exercising the constituent power on behalf of the people is seen as the expression of a profound conviction about the sanctity of the personal self. The chapters which follow are an attempt to sketch the religious foundation of such a conviction in the West. Justice as resting upon this conviction is a reflection in persons and institutions of a divine justice that transcends the human understanding. Edmund Burke, a late but profound believer in Western constitutionalism, put the point well in terms of the ardent rhetoric of which he was an unexcelled master:

There is one thing, and one thing only, which defies all mutation; that which existed before the world and will survive

26. Cf. Aristotle, *The Constitution of Athens,* chaps. v-xii. Charles Howard McIlwain, in his study of *Constitutionalism, Ancient and Modern* (1940) does not develop this contrast, but rather stresses what he considers the common core, namely a government under law. While such government under law is certainly an aspect of constitutionalism, in the modern sense, there have been non-constitutional regimes, such as the Prussia of Frederick the Great, which were *Rechtsstaaten* without being constitutional orders of the modern type. Note that the evolution of some contemporary totalitarian regimes seems to point in the direction of such authoritarian government under law.

> the fabric of the world itself; I mean justice; that justice, which, emanating from the Divinity, has a place in the breast of everyone of us . . . and which will stand, after this globe is burnt to ashes, our advocate or accuser before the great judge. . . .

The Stoics would not have rejected these words. But they were nonetheless content to accept a political order which failed to institutionalize its realization for each and every individual. Not so Western constitutionalism.

Chapter Two

MEDIEVAL CONSTITUTIONALISM

Saint Augustine's rather reluctant concession of a Christian's obligation to passive non-obedience when a ruler commands what God forbids blossomed forth into a key doctrine of medieval constitutionalism. Basically, the great bishop had, like any good Roman, been convinced that Romans 13 was right: "Obey the powers that be."[1] "For there is no power but of God" and as a consequence he who resists the established power, resists that which God has "ordained."[2] For him, the church had as yet no political function. But as the medieval order developed, a doctrine of active resistance to rulers who abused the power entrusted to them became widely recognized. Many writers, especially on the ecclesiastical side of the numerous struggles between secular rulers and ecclesiastical authorities, developed the inherent possibilities. The church became the ultimate arbiter as to when and to what extent a ruler had violated the law and hence could be resisted. Such violation of law was ultimately linked to faith, the ordinance of God upon which Saint Paul

1. The rendering of the original text into Latin and the various vernaculars has produced a variety of interpretative glosses bound up with the long history of Western thought on political obligation. For a good recent study of the right of resistance in the medieval perspective, see John D. Lewis and Oscar Jaszi, *Against the Tyrant: The Tradition and Theory of Tyrannicide* (1957). The most authoritative earlier treatment is Kurt Wolzendorf, *Staatsrecht und Naturrecht in der Lehre vom Widerstandsrecht des Volkes* (1916).

2. Greta Scharffenorth, "Römer 13 im Politischen Denken" (unprinted dissertation, 1963) has carefully explored the political implications of Romans 13, especially in the thought of the Reformers.

had based his demand for obedience. As Thomas Aquinas wrote: "As soon as a ruler falls under sentence of excommunication for apostasy from the faith, his subjects are by that very fact freed from the rule, and from the oath of fealty which bound them." In most medieval writers such notions were connected with a doctrine of tyranny; tyranny was believed to be "unjust" government and that meant a government directed not to the common good, but to the private good of the ruler. The Aristotelian origin of this definition of a tyrannical government easily obscures the transcendent implications of such a position. The common good had become inseparable from the effective functioning of a church to which the care for the spiritual welfare of the people was entrusted. As such, the church was called upon to guard and protect that ineluctable personal sphere, where by practising what his religion preached a man might live his faith and thereby become just and righteous to that limited extent which might permit him to hope for divine grace and salvation. And since the church needed helpmates in order to fulfil this function of guardian protector, the estates of the people became a decisive institutional instrumentality. Medieval constitutionalism became the government "by and with" estates, which for English-speaking peoples is epitomized in the growth of parliamentary institutions. John of Salisbury, although far from the "constitutionalist" thinking of a Fortescue, is in this perspective nonetheless the harbinger of constitutionalism, and his illustrious contemporary, Thomas à Becket, an early martyr in that cause. The right to one's religious convictions, protected by the pluralism of the feudal order with its stress upon landed property, exhibits in these early gropings that characteristic link of religion and property which has played such an important role in the evolution of the idea of human rights. It led, as will be shown in the pages that follow,

to a firm acceptance of a political order of divided powers for which the ancient doctrine of the mixed constitution provided a starting point, even though its purpose in the classical writers had been quite different, as has been shown above.[3]

"Est aliquod regimen ex istis commixtum, quod est optimum . . ." this is the judgment of Thomas Aquinas, after he has reviewed the other four forms of government: monarchy, aristocracy, democracy, and tyranny. Of this last form, he observes that it is entirely corrupt and that hence no law at all is made by a tyrannical government.[4] While the other three may be just, a regime which is mixed is more so; it is the best, because in such a regime the law is compounded of the several kinds that monarchy, aristocracy, and democracy produce. The idea is stated in terms of the Roman republican order. Thomas Aquinas believes in mixed government. His explicit value judgment in favor of constitutionalism deserves to be made quite clear at the outset, because highly authoritative opinions to the contrary have frequently been voiced. It has more particularly been argued on the strength of the earlier part of a lesser work of Thomas Aquinas that he was in favor of monarchy. Nor can there be any doubt that strong statements can be cited from Thomas Aquinas in support of this view.[5] Aquinas' state-

3. Cf. for what follows, *inter alia*, Etienne Gilson, *Le Thomisme—Introduction au Système de Saint Thomas d'Aquin* (1927); Thomas Gilby, *The Political Thought of Thomas Aquinas* (1958); O. Schilling, *Die Sozial- und Staatslehre des hl. Thomas von Aquin* (1930) (2nd ed.); Harry V. Jaffa, *Thomism and Aristotelianism—A Study of the Commentary by Thomas Aquinas on the Nichomachean Ethics* (1952).

4. *Summa Theologiae* (hereafter cited as *ST*) II. i. 95.4, meaning Book Two, Part 1, question 95, article 4. I have used the Madrid edition in the Biblioteca de Autores Cristianos (1952). Cf. also II. ii. 42.2. Here the *tyrannus* is called the *magis seditiosus*; he is not just, and therefore the disturbing of such a regime *non habet rationem seditionis.*

5. See especially *De Regimine Principum*, Bk. I, chaps. i-iii: "Just as the government of king is the best, the government of a tyrant is the worst." "*Rex est qui unius multitudinem civitatis vel provinciae et propter bonum commune, regit.*"

ments seem so unequivocal that anyone must be puzzled by the problem of how to interpret them. It is decisive for us to do so, because upon the solution of this problem depends whether we may consider Thomas Aquinas and the medieval tradition he epitomized as constitutionalist in the strict sense. The argument proceeds through several interrelated steps that are answers to the following questions: (1) What is the true meaning of the opening chapters of the *De Regimine* in light of the later discussion? Had he a reason for praising monarchy at the outset? (2) Can the later parts (Bks. II.v to end) be used in spite of the presumed authorship of Ptolemy of Lucca? (3) How can the discussion in *De Regimine* be reconciled with that in the *Summa*?

In considering the first question, it is necessary to remember that *De Regimine* was a *livre d'occasion,* written probably after 1265, for a young king, presumably Hugo II of Cyprus, who died in 1267.[6] It is now generally agreed that only Book I and the first four chapters of Book II are the work of Thomas himself.[7] These chapters evidently contain a vigorous apology for monarchy as the best form of government. This seems natural enough in a study addressed to a king; he was not likely to favor a political tract rejecting monarchy. But in light of the later discussion, especially in Book IV, but also Book III, chapter xi and elsewhere, it seems that such preference for monarchy was qualified by introducing the idea of a monarchy subject to law and indeed desirable only in certain regions, on account of climate and the resultant character of the people. In Italy (as well as in Greece) a constitutional republican regime is to be preferred. *"Qui autem virilis et in audacia cordis, & in confidentia suae intelligentiae sunt, tales regi non possunt nisi*

6. Jacques Zeiller, *L'Idée de l'Etat dans Saint Thomas d'Aquin* (1910), p. 9.

7. The proof is found in M. Grabmann, *Die Werke des hl. Thomas von Aquin* (1931); cf. also P. Mandonnet, *Des Ecrits Authentiques de Saint Thomas d'Aquin* (2nd ed., 1910).

principatu politico. . . . Tale autem Dominium maxime in Italia viget," we are told.[8] Having noted the importance of elections, the fact that such governments are subject to law and more especially a constitution is noted: *"quia legibus astringuntur rectores politici."* The rulers cannot go beyond the law, as they do in a monarchy, where *"in ipsorum pectore sunt leges reconditae."* In such a constitutional order (*regimen politicum*) the political rulers (*rectores politici*) *"non audebant aliquam facere novitatem, praeter legem conscriptam."* Such rulers may be monarchical, but they will be *elective* and are bound by the constitution of their office. Contrary to what is often said, the term "constitution" is in this context employed in its specific sense of setting up such a regime, and not to designate the law of an absolute prince, as it had existed in the Roman empire.[9] This distinction between the regal and the political regime, the *regimen regale* and the *regimen politicum*, became of seminal importance in the development of English constitutional thought. For John Fortescue made it a crucial ground in his analysis of the English constitution, as contrasted with continental and more especially French practice.[10] That a monarchical regime may be political, i.e., constitutional, had been hinted in *De Regimine* and thus became a view clothed with the full authority of the Angelic Doctor.

This raises squarely the second question. For it has been very generally argued that the latter part of *De Regimine* is

8. *De Regimine*, Bk. IV, chap. vii. Note also the following: *"tale* [the Roman Republic] regimen politiam appellant, a polis qui est *pluralitas*, sive civitas, quia hoc regimen proprie ad civitates pertinet, ut in partibus Italiae maxime videmus, et olim viguit apud Athenas . . . ," IV. i. The following quotations *ibid.*

9. Book IV, chap. ii: *"ideo de ipsius constitutione nunc est agendum. . . ."* *De Regimine* then proceeds to elaborate the process by which the constitutional order is set up and why.

10. Sir John Fortescue, *The Governance of England*, ed. Plummer (1885; rev. ed., 1926), chap. ii; Fortescue's category was that of a *regimen* (also *jus* or *dominium*) *politicum et regale*. Cf. also *DeLaudibus Legum Angliae*, chaps. 9 ff.

so much at variance with the first that it cannot be considered to contain the proper views of Thomas Aquinas. The authorship of Ptolemy of Lucca is controversial, but since he was a pupil of Thomas Aquinas and is traditionally credited with it, it seems preferable to accept him as the author, or rather as as the editor of this part.[11] What seems to me important is the following rather general reflection. It strikes me as little short of absurd to suppose that a pupil would offer, under the name of his teacher, a widely known author and revered authority, views that others would readily recognize as not those of the alleged author. More important, the views here presented fit better into what we know of the original author's views as set forth in his major systematic work (as contrasted with a *livre de circonstance*). Certainly one should not accept such an assumption without first exploring fully the possibility of reconciling the later parts of *De Regimine* with Thomas Aquinas' views on politics, as expressed in the *Summa Theologiae* and other works. To this task that the third question raises we now turn. It leads into the very core of the major theme of this chapter.

Let us consider first of all the context within which occurs the statement quoted above: "*est aliquid regimen ex istis commixtum.*" For it does not constitute a major argument, though it is part of one of the *respondeos* that admittedly contain Thomas Aquinas' own views most explicitly. The statement is made in connection with an argument about the "division" or as we would say "classification" of human laws.[12] In this article Thomas discusses a classification suggested by Isidore of Seville which included the law of nations under human law, although it is common to all nations and therefore "natural law." It is not necessary to explore this

11. I incline myself toward the view of Mandonnet that Ptolemy worked from notes of Thomas Aquinas or from a sketch of the latter; see Mandonnet-Destrez, *Bibliographie Thomiste* (1921), p. xx. But this view is not decisive for the argument in the text above.

12. *ST* II. i. 95.4.

subtle argument further at this point, except to say that Thomas "saves" Isidore's classification by suggesting that the law of nations is derived from the natural law, but not by *determinatio particularis,* but *sicut conclusiones ex principiis,* like conclusions from principles. Needless to say, the law of nations is here understood as the *jus gentium,* as the law common to all nations, rather than as the *jus inter gentes,* the law regulating the relations between nations. This latter belongs to a later period and is indeed human law by *determinatio particularis.* What really matters to us here is that Thomas suggests that there are many ways of classifying human law, and that one of these ways is classification according to the type of regime. He refers in this connection to Aristotle's *Politics,* although he merely reproduces part of the Aristotelian classification. What is important, however, is that the stress is on the different kinds of law and the related notion that by a combination of these different kinds a nearer approximation to the true nature of law can be achieved. For Thomas had argued earlier that law is or ought to be[13] always ordered for the common good. It is the expression of reason (*ratio*) which is the principle of human action. Here we are specifically told that *"perfecta enim communitas civitas est"* and reference is made to the beginning of the *Politics.* In his commentary on Aristotle's *Politics* Thomas Aquinas merely paraphrases these famous opening sentences of Aristotle's work; he offers no critical commentary. We are therefore justified in assuming that Thomas is ready to adopt the Aristotelian concept of the polity or *civitas.* These views are elaborated in the later parts of *De Regimine,* especially in Book IV. But the preference for the political (constitutional) regime is also worked out in the light of the experience of the Jewish people as

13. For the notion of "illegal law" see below, and for the text and quotations see *ST* I. i. 90.2.

described in the Old Testament, and the general proposition is put forward that it depends upon the quality of the people. Where men are wise and virtuous, as in ancient Rome, a constitutional order is preferable; but where men are perverse, stupid or corrupt, the royal regime is more fruitful.[14] Why? This question leads into the problem of the nature of law and of justice.

As everyone knows, a philosophy of law constitutes one of the important sections of the *Summa.* Like Aristotle before him and Kant thereafter, Aquinas recognized the central role of law in the moral and social order. In thus exalting the law, he expressed a widely, if not universally held, conviction of the Middle Ages about government and the social order: the pre-eminence of the law. Aquinas and his age conceived the social order in analogy to the cosmic order. Or rather they saw it as its mirror and *symbolon*; for the world at large was believed essentially as ordered by law which the divine creator had made to insure its orderly functioning.[15]

Law, then, was something given and fixed, and while subject to some change in the light of experience, it was believed generally undesirable to think of it as made, rather than found. Legislation had largely the function of clarifying and elucidating pre-existing law, whether divine, natural, Roman, or customary.[16] That being generally recognized, human law in its different forms (the problem of classification has already been encountered above) implements the higher law, and more especially the natural law by *determinatio particularis.* Such particular determination may take the form of deciding a case or of stating a rule; whichever it

14. *De Regimine,* Book II, chap. xi.

15. Cf. C. J. Friedrich, *The Philosophy of Law in Historical Perspective* (1958), chap. vi.

16. For emphasis on this point, see Charles Howard McIlwain's classic *The High Court of Parliament and Its Supremacy* (1910), though it seems to me that the learned author has perhaps a bit overstated the point.

is, such law has a distinct characteristic. But at this point a complication arises that is difficult to state, because of the equivocal meaning of the English word "law." In Thomas Aquinas and indeed in much European jurisprudence a distinction is drawn between "jus" and "lex." *Jus* is law in the sense of right law, whereas *lex* is characterized by four characteristics. These together constitute the famous definition of law. *Lex* is *"nihil alium quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata,"*[17] that is to say a law is an ordering of reason for the common good, made public by him who has the care of the community. The three essential features, then, are its rationality, its public purpose and its publicity. Thomas' elaboration of these essentials shows him to be a firm rationalist.[18] A difficulty arises, however, from the fact that the essential of publicity applies strictly speaking only to human law and divine law, whereas the eternal law, God's plan for governing the world (*summa ratio in Deo existens*), is admittedly not known. No one can know it according to what it is in itself[19] though some of it can be gleaned through a participation and through its "radiation"—indeed this is what the knowledge of truth consists in. Again, the natural law, the *lex naturae,* is known to all men, as far as its most common precepts are concerned which cannot be deleted from men's minds,[20] whereas the derivative precepts are like

17. II. i. 90.4. The discussion about *jus* is found in II. ii. 57. 1-4. It is not admissible, as is sometimes done, to identify *jus* with *justitia,* for in the first of these articles, Thomas considers whether *jus* can be the object of *justitia,* and answers it in the affirmative. The translation given differs from that of the Dominican fathers which is usually cited, but which involves a gloss on the text.

18. The actual argument is more fully stated in the work cited above, n. 12; cf. also the elaboration in Heinrich Rommen, *The State in Catholic Thought* (1945), chap. viii.

19. *"Nullus potest cognoscere secundum quod est in seipsa,"* II. i. 93.2. However, *"omnis creatura rationalis ipsam cognoscit secundum aliquam ejus irradiationem," ibid.*

20. *"... quaedam praecepta communissima, quae sunt omnibus nota ... secundaria praecepta ... quae sunt quasi conclusiones ....,"* II. i. 94.6.

conclusions from premises that presumably may at times remain unknown to many. Still, basically, these *leges* are known or knowable in their bearing upon man's existence, and as far as the eternal, the divine and the natural are concerned, God has seen to this publicity. He has the care of the human community in the higher sense.

Such all-permeating reasonableness in which the "command" aspect of the law is minimized would necessarily suggest a constitutional, rather than an autocratic order. There is no need for autocracy, because the assent of those affected by the law may readily be secured. Even though the symbolic resemblance of God and ruler be maintained, as it is in quite a few of Saint Thomas' passages, especially in the *De Regimine*, such a ruler will, like God himself, act in accordance with the indwelling law of nature which provides the ground for general consensus. However, in order to reinforce this conclusion, it is important to explore further the problem of justice, as it presents itself to the Angelic Doctor. Only in the light of such an exploration can the crucial question of the natural law and its relation to human law and more especially the basic constitutional law be fully illuminated.

The two most extensive and explicit treatments of justice by Thomas Aquinas are given in the *Summa Theologiae* (II.ii.58-61) and in the *Commentary* on Aristotle's *Ethics*, Book V.[21] These treatments must, however, be implemented by the discussion of God's justice (I.i.21). Thomas at once faces the question whether there is justice in God (21.1). He answers it by drawing a distinction derived from Aris-

21. *In Decem Libros Ethicorum Aristotelis ad Nichomachum Expositio.* I have used the fine edition by Raymundi M. Spazzi, published in 1949. Cf. also the penetrating study on the relation between Thomas Aquinas' thought and that of Aristotle by Harry V. Jaffa, *Thomism and Aristotelianism: A Study of the Commentary by Thomas Aquinas on the Nichomachean Ethics* (1952). The issue of justice is not given particular emphasis by this writer, who insists that Aquinas "imputes non-Aristotelian principles to Aristotle, although treating them as if they were Aristotelian" (p. 187).

totle between *justitia commutativa*[22] and *distributiva.* Only the latter belongs to God. It is demonstrated by the order of the universe that appears in natural as well as voluntary things. Therefore, God's justice is truth. The crucial sentence states: God's justice which establishes order in things in conformity with the reason of his wisdom *which is its law,* is suitably called truth.[23] In this striking doctrine truth and justice coincide, because the all-pervading reason of God as He deals with the world is implemented by the idea that God's justice is mitigated by His mercy (*misericordia*). Such mercy makes Him remove another's misery, and therefore all God's acts are both just and merciful.[24] Thus man's justice to be true virtue ought likewise to be tempered by mercy, by compassion and sympathy.

Whether justice be commutative or distributive, it is the virtue that looks toward another man, affects other human beings. As a virtue it is a characteristic trait (*habitus*) according to which a person gives everyone his due or right by his constant and perpetual willing.[25] It is necessary to offer this clumsy, literal translation, because Thomas attaches great importance to the elaborations he introduced into the familiar definition of the *Corpus Juris* that had described justice simply as the constant and perpetual will of giving everyone his right. We cannot here go into Thomas' doctrine

22. The Greek term *diorthotikon* is incorrectly rendered as *commutative* by Thomas Aquinas and many translators; it means rather *corrective,* and when so understood, it surely pertains to God as he punishes. But since Thomas thinks of it primarily in terms of buying and selling and other such kinds of communications he finds himself obliged to deny such mutual giving and receiving to God. Since we are here concerned with Thomas' thought, we shall use commutative in the text.

23. "*Justitia igitur Dei, quae constituit ordinem in rebus conformam ratione sapientiae suae, quae est lex ejus, convenienter veritas nominatur*" (I. i. 21.2).

24. "Opus autem divinae justitiae semper praesupponit opus misericordiae et in eo fundatur" (I. i. 21.4).

25. "*...justitia est habitus secundum quem aliquis constanti et perpetua voluntate jus suum cuique contribuit*" (II. ii. 58.1). The previous statement above is found at II. ii. 58.2.

of the virtues as *habitus,* which he considered the origin (*principium*) of good action. And since only voluntary acts can be virtuous, provided they are stable and firm (*stabilis et firmus*), that is to say, not the expression of a passing mood, just acts require that they are done knowingly (*sciens*) and deliberately (*eligens*), as well as firmly. It is evident that such a characterization of justice as a virtue serves to delineate an image of a particular kind of person, capable of ruling and of participating in rule as well as being ruled. We are therefore not surprised to find him argue against those who would attribute justice only to the prince. Surely the judge is the living just (*justum animatum*) and the prince is the custodian of the just, as Aristotle had shown, but the subjects also participate in this process: *"subditi reddunt quod suum est unicuique per modum executionis."* Justice as the virtue that makes men consider their fellow men is like all virtues expressive of a rule of reason (*regula rationis*). This virtue of justice can be either general or particular; the latter has particular interests or rights in view, whereas the former is concerned with the common good or general interest (right). It is this general justice which primarily interests us here. In a way, all acts which result from other virtues may thereby be related to justice; for they contribute to the common good, or public interest (II.ii. 58.5).

At this point the link with law is forged. For the Angelic Doctor now suggests that since it belongs to law to order the common good, this general justice might properly be called legal justice, for evidently by such justice a man brings the acts springing from the several virtues into concordance with the law. But as said it regulates the external acts in a man's relations with other persons. In these acts, proportionality is of crucial importance, because equality of treatment depends

upon it.[26] So does the political order, whose interest is superior to any individual's. The stress here is on the single individual, however (*unius personae*). His importance as the neighbor is highlighted by the fact that not only the general or legal justice is pre-eminent among the virtues, but also the particular justice. It is so subjectively, because it springs from the nobler part of man's nature, his "rational appetite" or will; objectively, because not only the virtuous person himself, but others benefit from his goodness.[27] But general or legal justice, justice according to law, is evidently for Thomas Aquinas the quintessence of virtue. It shows him to be a mediator between a command and a virtue ethic, as Kant was to be later.[28] The seeming posivitism is, however, nullified by his doctrine of the "illegal" law, that is to say the doctrine (traceable to Cicero) that a law contrary to natural law is a corruption and hence not a "true" law. Thomas might at this point be accused of circular reasoning: justice is said to be general, when it is according to law, but law is to be considered as a yardstick only, when it is in accord with justice (natural law). That this is not really a vicious circle presupposes a further exploration of Aquinas' doctrine of natural law, but before we can turn to this concluding general issue something needs to be said about his notion concerning the "precepts" of justice.

26. It seems best to quote the decisive passage: *"Materia justitiae est operatio exterior secundum quod ipsa, vel res, qua per eam utimur, proportionatur alteri personae, ad quam per justitiam ordinamur. Hoc autem dicitur esse suum unius cuiusque personae quod ei secundum proportionis aequalitatem debetur"* (II. ii. 58.11).

27. II. ii. 58.12. Aquinas then cites Aristotle's *Rhetoric,* but Aristotle merely reports that the just and the courageous are honored as a matter of fact, because they are useful to others. In all of the preceding argument he more or less follows the *words* of Aristotle as given in Moerbeke's translation, though filling them with a Christian *content.*

28. For the important distinction between the two kinds of ethics and their implication, see Herbert Spiegelberg, *Gesetz und Sittengesetz* (1935). The importance of Thomas is not adequately developed, because of the author's preoccupation with the term *"lex moralis"*; the term *legalis justitia* is equally revealing.

These precepts of justice (II.ii.122) are the commands of the Decalogue. They are intimately tied to the natural law, because natural reason assents to them as most manifest. It is very striking how Thomas Aquinas proceeds to develop this idea in detail. The first three commandments show, he thinks, that religion is the principal (*potissima*) part of justice; for in the goodness of the soul the primary constituent is the goodness of will (see below, chapter III). The law which seeks to make men good must lay a foundation (*fundamentum*) in religion which leads (*ordinatur*) to God. The impediments to true religion must be removed, and the most important of these impediments is that a man acknowledges a false god; the cult of such false gods must be prevented. Superstition is another impediment and must be combated. According to the third commandment—and the precepts of the Decalogue are like first and common principles of all law—the external cult of God is prescribed as of common benefit. And so the analysis proceeds, through the list of the ten commandments, showing how each is a basic legal principle, indicating how each man gives to all what is their due, as the first three prescribe what he owes God, and the fourth what he owes his parents. In a sense, then, these commandments and similar norms offered in Holy Scripture constitute a divine law; it was identified as such by Hooker, who speaks of it as "that part [of the eternal law] which bindeth them [men] and is not known but by special revelation from God."[29]

Natural law, by contrast, is known to all men by the light of reason, implanted in them by God. Or rather its basic principles *are* thus known, whereas the derivative ones *may be*. The first and basic principle of this practical reason is knowing the good (*ratio boni*). "*Bonum est quod omnia*

29. The term *lex divina* occurs in Thomas, e.g. II. i. 94.5 and 100.9. It is discussed at great length under the heading of *lex vetus* (II. i. 98-105) and *lex nova* (II. i. 106-108).

appetunt," Thomas declares apodictically. Therefore the first precept of the law of nature is that the good ought to be done and the bad avoided. These statements are manifestly tautological. In modern parlance, the good is referred to as value and interest, in the broad sense, and if that is what all seek, it is obviously not necessary to insist that they do so. The factual and the normative coincide. Thomas elaborates this tautology further by the observation that all the things toward which man has a natural inclination his reason apprehends as good, and consequently as something to be pursued by action.[30] But he then turns to the substantive content of such natural inclination, and offers three precepts: (1) self preservation, (2) conjunction of male and female, raising of the young, i.e., preservation of the species, and (3) seeking the truth about God and living in society with other men.

This doctrine embodies a deep and abiding faith in man and his capacity for virtue and self-improvement. A rational soul is man's proper way, and every man (i.e., everyman!) possesses a natural inclination toward acting according to reason.[31] This means that every man would like to act according to virtue, and that all virtuous acts are derived from the law of nature. Still, considered by themselves, many acts which virtue calls for are such that nature does not incline men toward them. To improve his own nature man has to overcome his passions with the help of reason, which embodies the law of nature.

Are these precepts universal? Is there just one natural law? Thomas believes that there is one basic law common to all men, though in concrete operation there is not the same truth and practical rectitude as to specific precepts. The common conceptions (*communes conceptiones*) do not

30. II. i. 94.2. This article also delineates the first three laws.

31. II. i. 94.3: *"cum anima rationalis sit propria forma hominis, naturalis inclinatio inest cuilibet homini ad hoc quod agat secundum rationem."*

lead, as in abstract and speculative thought which deals with the necessary, to common conclusions. The contingent intervenes and leads to differentiation. Also those who have the same values do not necessarily possess equal knowledge. Hence it is evident, Thomas writes, repeating himself, that there is one and the same truth and rightness (*rectitudo*) as far as the common principles of speculative and practical reason are concerned, and it is equally known. But there is not the same truth and rightness for all as concerns specific conclusions of the practical reason, nor is it equally known. He concludes that as far as the law of nature's common prime principles are concerned, they are the same for all.

In light of this doctrine, it is not surprising that we find Aquinas of the opinion that the law of nature is changeable. It may be changed by additions of all kinds such as have been made by divine and natural law. But it cannot be changed by subtracting from its basic principles, though the particular principles that have been added by way of specification may be and often are altered. Hence these basic principles known to all can in no way be deleted from men's minds.[32] It is striking and of crucial importance that the Angelic Doctor here proclaims an abiding belief in man's capacity for rational self-management and self-control. Such faith is an essential ingredient of his teachings on the subject of government according to law and of a constitutional order. To this topic we must now return by way of a conclusion.

Man, capable of knowing the basic verities disclosed in the general principles of natural law, can achieve a measure of justice by obedience to the laws, both divine and human, which are not in conflict with what reason teaches him to be

32. II. i. 94.5-6. "*Quantum ergo ad illa principia communia, lex naturalis nullo modo potest a cordibus hominum deleri in universali.*" For a modern American version, see the chapter on "Panhumanism" in *The New Belief in the Common Man* (1942).

right (*rectitudo*) and true. Since such legal justice is within the reach of every man, there is no need for autocratic government. The rule of one is good, more particularly if it is based upon elective office (the American president), but there should be a firm legal order within which the government's work is carried on. Besides the earlier evidence, we find another highly significant passage in the *Summa* within the context of the discussion of judicial precepts (II.i. 105.1.) Here Thomas discusses the subjection of the ruler to judicial decisions. He points out that the beauty of a nation's order (*pulchritudo ordinationis populi*) depends upon a good constitution (*principes bene instituti*). Two points must be watched in any effort to organize rulership well. One is that all have some part in ruling; for by such an arrangement the peace among the people is preserved and all love and guard such an order. After citing Aristotle and mentioning once again monarchy and aristocracy, he argues that a combination of these with popular election is best. Here is the passage:

> Such therefore is the best polity, well mixed and consisting of *regnum*, the rule of one; aristocracy, wherein many rule because of their quality, and of democracy, the power of the people, for then the rulers can be elected from among the people, and to the people belongs the election of the rulers.

He reinforces this his argument by claiming that such rule was instituted by divine law: Moses was the ruler and the seventy-two elders with him, but they were elected by and from among the people. Hence it is evident, he concludes, that that political order (*ordinatio principum*) is best which the law establishes.[33]

33. II. i. 105.1. The key passage reads: "*Talis enim est optima politia, bene commixta ex regno, in quantum unus praeest; et aristocratia, inquantum multa principantur secundum virtutem; et ex democratia, idest potestate populi, inquantum ex popularibus possunt eligi principes, et ad populum pertinet electio principum.* Then, after citing Deut. 1:15, Exodus 18:21 and Deut. 1:13: "*Unde patet quod optima fuit ordinatio principum quam lex instituit.*"

Thomas Aquinas' definite preference for "constitutional" government as a system of divided powers offering a measure of protection for a personal sphere is also, it has been persuasively argued, confirmed by what we know about his activities in the monastic order to which he belonged. Such orders constitute a kind of "political" order, even though definitely apolitical in purpose, like many other organized groups. The order of the Dominicans was the "institutional setting" for the work of Aquinas during most of his life. A British scholar has recently put this aspect of the problem rather well:

> Evidence of what St. Thomas reckoned was the soundest form of government is furnished by the Constitutions of his own group, the Order of Preachers. He was prominent in its academic administration and was a member of legislative Chapters and Commissions.

He then goes on to speak of the Spanish background of Saint Dominic, of local *fueros* (constitutions) and of free communities, which were, he says, "the nurseries of European constitutional liberties."[34] He adds that "his order was to grow with the guilds, corporations, parliaments and universities of the West, and to flourish most happily in the free cities and nation states . . . ," associating himself with the somewhat speculative notion that Simon de Montfort might have been influenced in his thought by these ideas.[35] The Dominican prior, in contrast to a bishop, was part of a "polity"; for the Dominican "electorate" not only chose their rulers, but at limited intervals reviewed their performance and held them responsible for what had been done.[36] In short, Thomas Aquinas knew from active participation how a co-operative commonwealth might function

34. Thomas Gilby, *The Political Thought of Thomas Aquinas* (1958), pp. 289-291.

35. Cf. Ernest Barker, *The Dominican Order and Convocation* (1913), pp. 27 f.

36. M. D. Knowles, *The Religious Orders in England* (1948), chap. xiii.

and the range of personal freedom not only of participation, but of independence, it might provide.

It is therefore not as surprising as has been maintained by those who have imputed to Aquinas (and the medieval tradition he epitomizes) a strictly monarchical outlook that Ptolemy of Lucca should have represented him in the later books of *De Regimine* as a believer in constitutionalism. Indeed, the striking passage in which Ptolemy speculates on how the Romans might have been able to maintain an effective constitutional order is not as far from Aquinas as has often been believed. Ptolemy attributed the vitality of Roman constitutionalism to three factors. Among these patriotism (*amor patriae*) ranks first, but the zeal for justice (*zelus justitiae*) and for civil benevolence (*zelus benevolentiae*) are likewise crucial. He then makes the startling observation that such love of the fatherland is the equivalent of Christian belief. Why? Because it leads to a deep concern for the common good—the public interest.[37]

Such reflections constitute a bridge to the secular anticlerical "constitutionalism" of Marsilius of Padua and his followers. Marsilius' thought is, as far as our problem is concerned, inspired by the theory of Aristotle, Polybius, and Cicero. Determined to eliminate the participation of ecclesiastical authorities in secular affairs, he falls back upon the Greek and Roman notion of achieving freedom and justice through the effective participation of the citizenry in a government of the "best." It has long been recognized that his views were inspired by the political order of his native city just prior to its becoming a *signoria* or dictator-

37. *De Regimine Principum,* Bk. III, chaps. iv-vi. Note especially the following passage: "*Amplius autem amor patriae in radice caritatis fundatur, quae communia propriis, non propria communibus anteponit . . . virtus autem caritatis in merito antecedit omnem virtutem . . . ergo amor patriae super caeteras virtutes gradum meretur honoris. . . .*" He then cites Cicero *De Officiis* to the same effect, and after quoting Sallust, gives a reference to St. Luke and to the passage in Deuteronomy that asks for the love of neighbor and God, and finally links this Roman political order to that of the Maccabeans.

ship. Since he served both this *signoria* and thereafter the Emperor Lewis of Bavaria, he has been suspected of being an opportunist, like Machiavelli afterwards. But a careful reading of the *Defensor Pacis* (1326) shows clearly that his preoccupation was not with constitutionalism at all, but with the unity and security of the state. Indeed, the survival of the political order is the paramount consideration, and hence justice is no longer for him a transcendent standard by which to evaluate the political order, but "the consequent and derivative of human association."[38] Such a radical deviation from prevailing medieval views, while inspired by Marsilius' desire to subordinate the church (and of course all lesser associations) to the legislator of the *civitas* as represented by the citizens' assembly or at least its *valentior*, or *sanior* and *melior pars*,[39] is given a broader philosophical basis. For Marsilius sees political man as primarily a biological being, seeking corporeal security and peace, but fighting unless placed under a coercive order. In a sense he returns to the Augustinian pessimism about man and politics, but without providing the transpolitical counterpart of a *Civitas Dei*. Political man thus constituted needs a political order which possesses complete unity of government, expressed in firm coercive (*coactiva*) commands. Reverting to the Greek and Roman *civitas* which was at once an ecclesiastical and a

38. Marsilius of Padua, *Defensor Pacis*, ed. Scholz, Bk. I, chap. xi; in the next chapter occurs the famous statement: "*legislatorem seu causam legis effectivam primam et propriam esse populum seu civium universitatem aut ejus valenciorem partem . . .*" (para. 3). Ewart Lewis has, in a recent learned paper, "The 'Positivism' of Marsiglio of Padua," *Speculum*, XXXVIII (1963), 541-588 argued that Marsilius' doctrine of law was not as revolutionary or contrary to prevailing medieval views as has been maintained by Gewirth, LaGarde, and Entrèves. Cf. Alan Gewirth, *Marsilius of Padua—The Defender of Peace* (1951); Georges de LaGarde, *La Naissance de l'esprit laique au decline du moyen age*, Vol. III, "Marsile de Padoue" (1934); A. P. d'Entrèves, *The Medieval Contribution to Political Thought* (1939), pp. 61 ff. Lewis a bit overstates her important corrective, and her views on Aquinas fail to take his constitutionalism into account.

39. Gewirth, *op. cit.*, pp. 23 ff. provides the institutional setting for Marsilius' equivocation on this score.

political order, he makes the government the "ruling part" (*pars principans*) of the *civitas*, and subjects this ruling part or group to the legislator, the people who are both the constituent and the legislative assembly. It is the pattern of radical democracy, familiar from Periclean Athens, with its intrinsic propensity to being perverted into tyranny, as happened both in Athens and Padua. Such an order is not at all constitutional in the distinctive sense of the Aristotelian *politeia*, let alone Western constitutionalism, even in its medieval form. Rather was it the precursor of Rousseau, with whom Marsilius shares the emphasis on will as the determinant of what is right in a particular political order.[40] Hence laws are the commands of a single and indivisible "sovereign" unrestrained by any laws, except to the extent to which he himself considers it conducive to the survival and stability (tranquillity) of the state, the republic. Let these few remarks suffice to characterize this radical early abandonment of the notion of a transcendent justice that imposes limits upon the state and protects persons against it. It is mentioned here primarily in order to highlight the contention that the recognition of a higher norm, guarded by the church, upon which medieval constitutionalism rested, was basic to its distinctive Western mode.[41] It is strange, indeed,

40. Ewart Lewis' insistence that will had been an important constituent of conceptions of law since the *Corpus Juris* and was characteristic of much medieval jurisprudence, while certainly correct, does not affect the argument in the text; for the secular rational will of the citizens, even if molded by Christian ethics (as she persuasively argues Marsilius believed it to be), is surely radically "sovereign" on her own showing; she herself at one point compares the position of the *legislator* to that of the pope in the writings of radical papalists; see p. 563. Yet I quite agree with her that "Marsiglio's starkly legalistic conception is rather a selection from medieval tradition than a departure from it..." (p. 574 n. 12). It is noteworthy that she speaks of "the persistent legend that medieval thought had no concept of legislation"—a legend against which see my *The Philosophy of Law in Historical Perspective* (1958, 1963), chap. vi.

41. For the complex relation of Marsilius' doctrine concerning the state-church issue to Aristotle, see the learned study by Martin Grabmann, "Studien ueber den Einfluss der aristotelischen Philosophie auf die mittelalterlichen Theorien ueber das Verhaeltnis von Staat und Kirche," *Sitzungs-*

that such a doctrine should have been a mainspring for the efforts of the Conciliar movement to "constitutionalize" the church, but perhaps also an explanation of its ultimate failure; for these efforts had an anarchic tinge of radical and unrestrained democracy.[42]

It has at times been claimed that Marsilius' doctrine was inspired by William of Ockham, but in the absence of positive evidence this has been denied, even though a close relationship is admitted.[43] They shared a desire, widely felt at the time, to strengthen the secular arm of government against the pretensions of the church, as epitomized in *Unam Sanctam* (1302), but whereas Marsilius was primarily a political writer, Ockham was a philosopher of great depth and subtlety. His conception of justice was not born of political experience and observation, but rather forms an integral part of a general philosophy, known as "nominalism" and developed in opposition to Thomas Aquinas and earlier "realism."[44]

Ockham's view of justice unlike Marsilius' is rooted in his conception of God, and hence transcendental, indeed radically so. "By the very fact that God wills something, it becomes just. . . ."[45] But he goes even a step further and proclaims that right reason is called that which is willed (by the divine will). Such radical emphasis on the will as the

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berichte der Bayerischen Akademie der Wissenschaften, Philos.-Hist. Abt. (1934), chap. ii, and the literature discussed there, especially Battaglia, de Lagarde, Scholz, *et al.*

42. Cf. for the first part of this statement the fine study by Paul E. Sigmund, Jr., "The Influence of Marsilius of Padua on XVth Century Conciliarism," *Journal of the History of Ideas,* XXIII (1962), 392-402.

43. Cf. Grabmann, *op. cit.,* pp. 58 f. This author refers to a classic article by Rivière in the *Dictionnaire de théologie catholique* on Ockham, but adds interesting further evidence against such influence.

44. Etienne Gilson, *The Unity of Philosophical Experience* (1950), chap. iii, treats this issue in a broader context; the title, "Road to Skepticism," is indicative of the basic issue.

45. Ockham, IV, Sententiae, qu. viii-ix, E, as quoted in Paul Vignaux, *Justification et Prédestination au XIV Siècle* (1934). I owe this and the next quotations to the valuable paper by Dom David Granfield, "The Scholastic Dispute on Justice: Aquinas versus Ockham," *Nomos,* VI, *Justice* (1963).

source of all justice, both divine and human, sprang from Ockham's skeptical view of human knowledge and the consequent inability of man to learn what the law is. Hence: "This legal skepticism is based both on the debility of human reason and on divine arbitrariness in a provisional universe." Justice is, even more than in Saint Augustine, a strictly theological category; only faith radically separate from reason and revealed by an authoritative source can suggest its meaning, and consequently "there can be no law that is openly repugnant to superior law or to reason [as defined above], whence any civil law whatsoever which is repugnant to divine law or to obvious reason is not law."[46] That such a view is as far removed from the secularism of a Marsilius as it is from the kind of moderate and mediated transcendence which Thomas Aquinas set forth means that it is relevant to our argument in this chapter only as showing that not all transcendent conceptions of justice, but only those which call for a constitutional order of divided powers are paradigmatic for the political order of medieval constitutionalism.

Only such a conception leads to the conclusion that divine and natural law, both manifestations of the eternal law by which God governs the world, provide truly constitutional government. Such constitutional government depends upon an abiding faith in human beings as rational and well-intentioned and therefore capable of effectively participating in the political order and in the making of its laws by electing those who speak for them. A transcendent faith in justice as a capacity of God mirrored in man is the font of this medieval constitutionalism. Thomas was only the greatest spokesman of this attempt at organizing society

46. Ockham, *Dialogus*, I. vi. 100. He significantly adds that "the words of canon or civil law, in case they are repugnant to divine law, i.e., Holy Scripture, or to right reason, are not to be observed." That such a view is an anti-papalist position is evident.

in operative "estates" which would have some prospect of success in the difficult task of making human laws reasonable, that is to say, worthy of that dignity of man which Christ had vindicated for all men.[47]

47. A number of further significant dimensions of the above highly topical discussion have had to be left aside, notably the issue of realism versus nominalism, the distinction between the *potestas directa et indirecta papae in temporalibus* and finally the interrelation between property and rule, *dominium* and *imperium*. For the latter see Richard P. McKeon, "The Development of the Concept of Property in Political Philosophy: A Study of the Background of the Constitution," *Ethics*, XLVII (1938), pp. 297-366; note also this author's important contribution on justice to *Nomos* VI *Justice* (1963).

Chapter Three

PROTESTANT CONSTITUTIONALISM

The return to Augustinian notions, more especially to the emphasis on the two kingdoms, rendered the Protestants, particularly Luther, at first indifferent to the problems of constitutionalism. In spite of their vigorous reassertion of transcendency, or because of it, justice appeared an unattainable ideal. On the practical side, the need of princely support counseled strong emphasis on the authoritarian aspect of government, the *Obrigkeit* or superior power of Luther's writings, such as *How Superior Powers Ought to Be Obeyed.* This outlook was gradually changed, however, as the needs of defending the faith against an emperor unwilling to bow to the Protestant challenge was becoming more clearly felt.[1] Calvin, too, although even more authoritarian than Luther in elemental feeling, found himself obliged to recognize some right of resistance to rulers hostile to religious reform. Lawyer that he was, he stressed the possible existence of constitutional means for restraining a ruler. In a famous passage of the *Institutes,* he suggested such a right, after condemning all resistance by "private men" except on grounds of religious conscience:

when popular magistrates have been appointed to curb the tyranny of kings, as the ephori, who were opposed to the kings

1. This shift in outlook and emphasis is important for the interpretation of Luther's and Melanchthon's political views, more especially on resistance. Cf. my *Inevitable Peace* (1949), chap. iv. The problem is also well developed in Sheldon Wolin, *The Politics of Vision* (1960), chap. v. See both for further references.

among the Spartans, or tribunes of the people to consuls among the Romans, or demarchs to the senate among the Athenians; and perhaps there is something similar to this in the power exercised in each kingdom by the three estates, when they hold their diets. So far am I from forbidding these officially to check the undue license of the kings, that if they connive at kings when they tyrannize and insult the humbler people, I affirm that their dissimulation is not free from nefarious perfidy, because they fraudulently betray the liberty of the people, while knowing that, by the ordinance of God, they are appointed their guardians.[2]

The importance of these few sentences of Calvin lay in the fact that they precipitated a search for such specific constitutional rules as might justify resistance, wherever believing Calvinists were confronted with the problem of protecting themselves against an unsympathetic ruler. The passage invited a body of writings, from a group known as the "monarchomachs," in which positive legal provisions are made the basis of an appeal to effective resistance.[3] Striking representatives of this approach were George Buchanan and François Hotman. The latter in his *Franco-Gallia* (1574) stated that he "became convinced that the only true remedy for all our evils is to return to the ways of our forefathers."[4] He proposed to reconstruct that status which "the old French and German historians say had existed for a thousand years." The former similarly undertook to reconstruct in his *De Jure Regni Apud Scotos* (1579) what he believed to be the old order, but what was actually a modern constitutional system. These and other Calvinist writers were matched by a group of Catholic monarchomachs, mostly Jesuits, who similarly harkened back to medieval constitutionalism.

2. *Christianae Religionis Institutio,* Bk. IV, chap. xx, par. 31. The translation is that of the Calvin Translation Society, Edinburgh (1845-1846).

3. The point was most effectively made by Kurt Wolzendorf, *Staatsrecht und Naturrecht in der Lehre vom Widerstandsrecht des Volkes* . . . (1916). Cf. also Oscar Jaszi and John Lewis, *Against the Tyrant* (1957).

4. The edition used of the *Franco-Gallia* (of 1665) is the most complete. See for this Beatrice Reynolds, *Proponents of Limited Monarchy in Sixteenth Century France: Francis Hotman and Jean Bodin* (1931).

Among these Mariana is particularly interesting, because as a Spaniard he stressed the role of the estates. Like Buchanan and Hotman, he was steeped in history, which provided the sources for many of their arguments. But these continental voices were destined for eventual extinction as absolutism triumphed. Only in Sweden and Poland did the institutional development favor their peers.

The course of development was very different in England. Here the ideas of medieval constitutionalism were transformed into the mainstay of the modern constitution. Sir John Fortescue had, as we mentioned, adopted and adapted the distinction between regal and political rule, explicitly citing Thomas Aquinas, but developing his thought in the concrete and specific terms of the lawyer-politician, rather than exploring the philosophical and theological background. Presumably justice was what the church said it was, and Aquinas' emphasis upon legality suited his purpose very well. He was ready enough to admit that there was a difference between law and justice, but he undertook to show that the proceedings in English courts were more apt to achieve justice than those in civil law courts.[5] He thought the jury a more dependable truth-finder than witnesses, as likewise he believed that a parliament or "great council" helps in framing just statutes. Indeed, he argued that Rome was great while she maintained such a council, whereas she declined afterward.[6] The regal and political order will say the constitutional order of England is good and is better than the French, because it achieves greater justice. There is no reason in the present context to dwell at greater length upon Fortescue's thought, but this much

5. *De Laudibus Legum Angliae*, chaps. xix ff. That Fortescue did not have a good understanding of French law, we have already noted; however, this is not germane to our argument here.

6. *The Governance of England*, chap. xvi. Indeed he was convinced that Frenchmen would rise against their autocratic (regal) order, if they were as courageous as Englishmen, chap. xiii.

helps to indicate the depth of a tradition which the thinkers of Protestant England encountered in the later sixteenth century.[7]

Among these thinkers, the one most significant and fruitful for our present particular inquiry is Richard Hooker (1553-1600). Generally concerned with mediating between the Aristotelian and scholastic tradition, more especially Thomas Aquinas, and the new Protestant thought, he is not primarily occupied with constitutional problems, but with the more general problems of law. But since his major purpose was the defense of the Elizabethan religious establishment against its Puritan critics, and since the core of this defense focused upon the "ecclesiastical polity," that is to say church government, he could not help being deeply involved in the issues of English constitutionalism. The concrete form of this constitutionalism at that time had found a thoughtful exponent in Sir Thomas Smith (1514?-1577); his brief treatment was a reasonably authoritative interpretation of the political and governmental system of the time.[8] Smith built on the basic notions familiar through Fortescue, though transforming them by stressing the omnipotence of the "king in parliament." Let us pause a moment to recall these notions. Smith attributes to the parliament a capacity to represent the people at large. He declares every Englishman is present in this parliament either in person or by a delegate, meaning everyone from the king down to the

7. See for some exciting details of the institutional context, Charles Howard McIlwain, *Constitutionalism—Ancient and Modern* (1941), chap. iv. But McIlwain's interpretation of Fortescue does not do full justice to the meaning of *politicum*.

8. Sir Thomas Smith, *De Republica Anglorum* (1583). The book was written somewhat earlier; it achieved the position of a minor classic as its inclusion in the Elzevir series (which I use) shows. A critical modern edition, with an introduction by L. Alston, was published in 1906. Cf. the discussion in J. W. Allen, *A History of Political Thought in the Sixteenth Century* (1928), pp. 262-268. Cf. also the discussion in George L. Mosse, *The Struggle for Sovereignty in England* (1950), pp. 21 ff. as well as Francis D. Wormuth, *The Origins of Modern Constitutionalism* (1949), and J. A. Pocock, *The Ancient Constitution and the Feudal Law* (1957).

lowest person. For this reason, consent of the parliament may be taken as the consent of everyone.[9] He dwells upon many procedural details which reinforce the constitutional order. This insistence upon the role of parliament must, however, not be taken to imply modern parliamentarism, let alone the sovereignty of parliament. He is talking of the parliament *including* the king, and what the constitution gives them is the highest power in legislation, finance, and adjudication. The king by himself has further powers (appointments and war and foreign affairs). We find, therefore, quite unlike what is offered by Fortescue, an awareness of a division of powers. Significantly, Smith undertakes to rationalize this division by reference to the theory of mixed government. He clearly recognizes the separate role of legislation as the making of the law and as distinct from judicial interpretation.[10] It is evident that he believes in this kind of constitutional order. But he is not interested in philosophical speculation and there is no attempt made to generalize from the facts as he saw them.

The really important intellectual labor was undertaken by Richard Hooker in the next generation. His work is quite remarkable for its almost scholastic exploration of the theological and philosophical foundations of this kind of constitutional system.[11] He undertook to demonstrate its basic legitimacy and the consequent legality of its ecclesias-

9. Smith, *op. cit.*, Bk. II, chap. ii.

10. For an elaboration and the controversy concerning this point, see my *The Philosophy of Law in Historical Perspective* (1957), pp. 68-69.

11. Hooker's treatise, *The Laws of Ecclesiastical Polity*, is actually incomplete. We have the first five books; of the remaining three, it is generally believed that the eighth is largely in the form which Hooker would have given it; the reconstruction of the other two is more doubtful. The standard edition of his work is that by John Keble; it was reissued in a revised edition by R. W. Church and Francis Paget (1888). The introductions to these editions are important, as is A. P. d'Entrèves, *Riccardo Hooker: Contributo alla teoria e alla storia del diritto naturale* (1932). Of more recent studies mention might be made of F. J. Shirley's *Richard Hooker and Contemporary Political Ideas* (1949). Cf. Friedrich, *op. cit.*, pp. 69 ff. Cf. also Peter Munz, *The Place of Hooker in the History of Thought* (1952).

tical establishment. Hooker approaches this task by a broad philosophical exploration of the nature of law and legislation. In doing so, he built upon the foundation which Thomas Aquinas had so well laid, but without neglecting the very specific meaning that these general ideas had acquired in the English setting.[12] Like Aquinas, Hooker sees law within the broad cosmological context of a universe that is ordered by law throughout. That law is the manifestation of the divine reason, and is therefore God's eternal law. This law is composed of (1) Nature's law, (2) the celestial law of the Angels, (3) the law of Reason, and (4) human law. Human law is in turn subdivided into statutory law, customary law, and international law. Such human law men make "probably gathering [it] to be convenient" "out of the law either of reason or of God" to suit themselves. Although this classification is footnoted by several references to Thomas Aquinas, it differs in some significant respects from that of the Angelic Doctor. The most significant of these deviations is a hinted distinction between the law of reason and nature's laws. Hooker writes: "Forasmuch as those things are termed most properly natural agents, which keep the law of their kind unwittingly, as the heavens and the elements of the world, which can do no otherwise than they do; and forasmuch as we give unto intellectual natures the name of Voluntary agents, that so we may distinguish them from the other; expedient it will be, that we sever the law of nature observed by the one from that which the other is tied unto."[13] Since Hooker's basic concept of law is that of "any kind of rule or canon whereby actions are framed," it is evident that Hooker, responding to rising natural science, distinguishes the law of nature that is reason from the laws of nature that are hypothetical generalizations upon established matter of fact (see below for further elaboration

12. Shirley, *op. cit.*, pp. 90 ff. D'Entrèves, chap. iv.
13. Hooker, *op. cit.*, I, iii, 2 (referring to Book, chap., and par.).

of this distinction). There is no implication, of course, that the latter are contrary to reason; but the reason may be hidden and known only to God.

As a matter of fact all these laws are held together by reason. Their obligatory quality springs from their rationality, but whereas God's eternal law and the laws of nature are unalterable and inexorable, the laws of angels and men may be violated and transgressed. The reason is that man belongs with part of his nature to the natural order of the animal kingdom, but with the other part he belongs to the kingdom of God. (Thomas had allowed for the distinction by introducing a law of the *fomes,* defined as *"inordinata et habitualis concupiscentia appetitus sensitivi"*—a sort of afterthought.) A pronounced believer in the freedom of man, Hooker rejects the doctrine of the early Reformers on the *servum arbitrium* or "servant will." Like the scholastics and the humanists, he stresses the role of reason in the shaping of human law. Man's readiness to accept this law of reason Hooker explains by the fact that man desires to achieve perfection in the image of God. The same rational optimism as Thomas' permeates his thought. Hence there is no really serious problem in organizing a measure of co-operation. The Puritans in their radical Calvinism are wrong; their pessimism is the result of a lack of confidence in reason. At the conclusion of his long preface on the errors of the Puritans, he counsels them: "Think ye are men, deem it not impossible for you to err; sift impartially your own hearts, whether it be force of reason or vehemency of affection, which hath bred and still doth feed these opinions in you."

That "the laws of well-doing are the dictates of right reason" (I,vii,4) is the central thought around which Hooker groups his argument in favor of reason. Man cannot want what he considers false and bad. Wrongdoing is the consequence of a lack of insight. That does not mean that correct

insight necessarily leads to right action, for a prejudice may interfere (I,vii,4-6). If it is asked how one can know what is good and right, Hooker answers that such knowledge is derived either from an understanding of the grounds and reasons of the action or from signs and tokens. "The most certain token of evident goodness is if the general persuasion of all men to so account it," and hence "the general and perpetual voice of men is as the assent of God Himself. For that which "all men have at all times learned nature herself must needs have taught" (I,viii,3). These observations, Hooker thinks, explain why it is so difficult for a common error to be eliminated; only when we are able to perceive causes, having formerly been guided by signs and tokens, can such a reversal take place. Though the term "common sense" does not, I believe, occur, it is evident that Hooker has reference to it.

Having established these philosophical premises, Hooker is now able to define the law as "a directive rule unto goodness of operation." Rational laws are ordinances of reason, and Hooker is very insistent that such rational law can be known and understood by reason without any aid from revelation. The divine law is a help but not a requirement: "whereas no man in justice and reason can be reproved for those actions which are framed according unto that known will of God, whereby they are judged . . ." yet "the will of God which we are to judge our actions by, no sound divine in the world ever denied to be made in part manifest by the light of nature, and not by Scripture alone. . . ." (III,viii,3). Hence the Puritans' disparagement of reason is wrong. For this law of reason contains all that men know on the basis of their natural understanding, and it guides them in their actions. "Wherefore the natural measure whereby to judge our doings is the sentence of reason, determining and setting down what is good to be done" (I,viii,8). This law of rea-

son is something which Hooker is convinced no man can reject once he has comprehended it, nor is it easy to find men who have not at least some inkling of it. That is why he bitterly complains of the Puritans by whom "the name of the light of nature is made hateful with men," because "the wisdom of man is being debased either in comparison with God or some special thing" or false learning bandied about. Such "disparagement of reason" can be shown to be not only in error, but an obstacle to building a political or ecclesiastical order. Hooker quotes Thomas Aquinas again at this key point to this effect: "Out of the precepts of the law of nature, as out of certain common and undemonstrable principles, man's reason doth necessarily proceed unto certain more particular determinations, which particular determinations being found out according unto the reason of man, they have the names of human laws, so that such other conditions be therein kept as the making of laws doth require."[14] Hooker observes that constitutions are such human laws. They embody the law of reason.

> Law rational therefore which men commonly use to call the law of nature meaning thereby the law which human nature knows itself in reason universally bound unto, which also for cause may be termed most fitly the law of reason; this law, I say, comprehendeth all those things which men by the light of their natural understanding evidently know, or at leastwise may know, to be seeming or unbeseeming, virtuous or vicious, good or evil for them to do. (I,viii,9)

Upon this foundation then, which shows that nature gives laws which are suitable to live by, Hooker erects his theory of the constitutional order. As a legal community, perhaps contractual, certainly instinctual, it rests upon rules which, whether explicitly or tacitly agreed to, determine the nature of the political association and of the living together

14. III, ix, 2, citing Thomas Aquinas, *Summa Theologiae*, II. i. 91.3. We have seen above, chap. ii, that Hooker's is not really Aquinas' view.

under law. This constitutional order, says Hooker, we call the law of the commonweal; it is the true soul of the political body. This formula, which is literally identical with that of Althusius (see below), makes the constitution the basis, grounded in the natural reason of man. Such a constitution may be customary or statutory, but in any case its validity rests upon the rational insight of men into the ways of human living together. Such an order cannot be rightfully resisted; its laws are either evident to reason or legitimized by the order which is founded in consent. "Where the king does guide the state, and the law the king, that commonwealth is like a harp or melodious instrument, the strings whereof are tuned and handled all by one . . ." (VIII,ii,12).[15] Consent, or more properly speaking consensus, is possible, because of man's rationality. It is also required for the validity of laws; unless public consent has made them, rules and commands are not truly laws (I,v,8).

Hooker's doctrine of consent has given rise to considerable discussion. It is crucially important for our present topic. For it is upon this need for consent that Hooker builds his demand for the participation of the people. His thought is in the English tradition (and its Continental parallels.) A parliament or council, composed of representatives of the whole people, is needed for the making of sound law. "The lawful power of making laws to command whole politic societies of men belongs properly onto the same entire societies," and "laws they are not therefore which public approbation hath not made so," and further, "laws therefore human of what kind soever are available by consent" (I,x,8). That consent need not be personally voiced. "As in parliaments, councils, and the like assemblies, although we be not personally ourselves present, notwithstanding our assent is

15. But even when the consent has been dissipated, Hooker sees no legal possibility of escaping the duty of obedience. Cf. VIII, ii, 10 and throughout. The stress on law and consensus could produce the opposite conclusion.

by reason of other agents there in our behalf" (*ibid.*). Clearly then, the constitutional order can and will organize the participation of all, and furthermore, behind such participation there is "that which hath been received long sithence and is by custom established." This means that an established order remains consensual, unless it is explicitly revoked. "The act of a public society of men done five hundred years sithence standeth as theirs who presently are of the same societies, because corporations are immortal. . . ." Statutes often are mere affirmation or ratification of what the common law provided and what the law of reason required, because it may be expedient so to ratify it. But law may also make something a duty which was not one before; in that case it is "merely" human and derivative.

Hooker's defense of the Tudor system of government is fitted into these general propositions, with which he believes them to be fully in accord. Looking at them in the perspective of history, we cannot be equally sure. Perhaps we think of them too differently.[16] However that may be, he thought of it as a constitutional order, a "polity," maintained by the consent of the governed. "With us," he claimed, "one Society is both the Church and the Commonwealth . . . whole and entire . . . under our chief Governor" (VIII,i,7). Hence the "religious verities" supported the polity in its essential order, and the transcendence of the faith provided a lasting underpinning for the prevalent ideas on justice and law. Ultimately, their authority rests on their consonance with reason, the divine spark in man. In this he followed Aquinas and opposed the Puritans' preoccupation with the

16. Shirley actually speaks of Tudor "despotism"—surely something of an exaggeration. But his general discussion of the issues involved, *op. cit.*, chap. v, seems quite right, including the observation that Hooker was no forerunner of Filmer, and that he "nowhere makes out a case for monarchy as the one divinely ordained form of government," p. 105. I quite agree that "he has, in fact, the English situation ever before his eyes"—the only question being whether it was the situation as we see it, or as his contemporaries saw it. I suspect the latter.

word. In one memorable passage, Hooker summed up his own view of the transcendent basis of all law (including the constitution):

> Of Law there can be no less acknowledged, than that her seat is the bosom of God, her voice the harmony of the world: all things in heaven and earth do her homage, the very last as feeling her case, and the greatest as not exempted from her power: both Angels and men and creatures of what condition so ever, though each in different sort and manner, yet all with uniform consent, admiring her as the mother of their peace and joy. (I,xvi,8)

This is an echo of medieval lore, to be sure, but the more insistent emphasis on reason as the crucial test gives it a new turn. Such insistent rationality also was the stress of the Spanish Thomists, more especially of Franciscus Suarez. His *Tractatus de Legibus ac Deo Legislatore* (1613), while ostensibly written against James I's *Apology for the Oath of Allegiance,* was in fact a summing up of the thought of a school of writers, profoundly influenced by Thomas Aquinas: Franciscus de Vitoria (1483?-1546), Dominicus de Soto (1494-1560), Diego Covarruvias (1512-1577), and Fernando Vasquez (1509-1566). It has rightly been said of Suarez' *Tractatus* that it "is wonderfully akin to the *Ecclesiastical Polity,* both in method and outlook."[17] It would hardly be justifiable to extend our reflections to this great body of learning, were it not for the fact that these writers, too, reinforced the belief in a constitutional order, based upon transcendent justice. All men are seen as equally free and therefore, in forming societies based upon a common consensus (*communis sensus*), they retained the right to set up what government they pleased.[18] However, there is no development here of the inherent superiority of a consensual scheme, as propounded by Thomas and Hooker. The systematic exposition

17. Shirley, *op. cit.*, p. 174. On the following pages an interesting summary of the contrast of the two works is offered.

18. *Tractatus*, III, ii, 3 and III, iv, 1.

of such a view came from another quarter, namely Calvinism. It arose in conjunction with the discussion over the right of resistance.

Many years ago, I concluded a study of the *Politica* of Johannes Althusius (1563-1638) by contrasting his position with that of Thomas Aquinas. I then wrote: "Like St. Thomas Aquinas Althusius undertakes to safeguard the different spheres of life and to assert the inner differences of the several stages in the rising scale, while retaining a relation of them all to a final religious purpose." But I also emphasized the modern biological and psychological naturalism that found expression in Althusius' striking formula: *"Quod Deus est in universo, lex est in societate."* Perhaps I overemphasized this contrast; there is more of Thomas Aquinas in Althusius than I was then ready to recognize, and the naturalism of Althusius was not very radical. In his interpretation of political life God still plays an important part, even though man is taken to be subject to inherent natural necessities. That aspect of man's nature was not overlooked by Thomas Aquinas; indeed it was a major constituent of his thought, as we have seen.[19] Nonetheless, Althusius has been increasingly recognized as an outstanding figure in the development of Western political thought. This is at least in part due to the fact that he put into systematic form the political implications of Calvinism, and more especially its constitutional thrust. What a long drawn-out struggle was to prove in England during the seventeenth century was here anticipated by the theoretical exploration of the implica-

19. Carl Joachim Friedrich, *Johannes Althusius (Althaus) Politica Methodi Digesta.* Reprinted from the third edition . . . with an Introduction (1932); such a modification of my original position is also suggested in an (unprinted) dissertation by Stanley J. Parry, "The Political Science of Johannes Althusius" (1953, Yale Univ.). Cf. also Erik Wolf, *Grosse Rechtsdenker der deutschen Geistesgeschichte* (4th ed., 1963) chap. vi, and Pierre Mesnard, *L'Essor de la Philosophie Politique du XVIe Siecle* (1936, 2nd ed., 1951), Bk. VI, chap. ii. An English edition (selected) of Althusius is being prepared by F. S. Varney.

tions of Calvin's basic position as described at the beginning of this chapter. Althusius did this partly in response to a body of political writings sprung from religious wars: the pamphlets on the right of resistance which both Protestants and Catholics had produced and which were mentioned above. These writings had contributed a number of viewpoints and approaches, but as *livres de circonstance* they were more concerned with the immediate propagandistic effect than philosophical depth. Yet they had in common that they were protests against the rising absolute monarchies, their concentration of power in the hands of the hereditary ruler, and the consequent destruction of medieval constitutionalism as practiced in governments "with estates" (*Staendestaat*). Since this trend toward absolutism had found its great juristic apologist in Jean Bodin, it was only logical that the opposing trend should likewise be systematically expounded. Althusius' work is the determined attempt to provide a theory for a pluralistic political order. In undertaking to build such a theory, he utilized and significantly transformed the heritage of Aquinas, as Hooker had done in developing his apology for the Tudor compromise between absolutism and constitutionalism.

The pluralism of Althusius is different from modern pluralism. It does not center upon an unattached individual person whose several initiatives then serve to bring into being the groups whose plurality the contemporary free societies embody. Instead, and in line with medieval precedents, Althusius presents the inclusive political order as consisting of a sequence of "federal" unions. At the bottom are the families, as in Aristotle and Bodin. These families are by *pactum, foedus,* or *consociatio* united villages on one side, into guilds on the other. The guilds in turn form towns, and the towns and villages together constitute the next level of federal union, which is the province. The

provinces in turn unite (as they demonstrably had in the United Netherlands) into a comprehensive political entity, a *respublica* or *regnum,* and such *regna* might in turn be united in an empire. In contrast to the medieval "hierarchy" this construction begins at the bottom and proceeds upward, providing the necessary consensus as the basis for the required *concordia.* Hence politics is for Althusius "the science of linking human beings to each other for a social life." The *respublica* or *regnum* is the comprehensive community "organized for cooperation toward the attainment of common purposes."[20]

Althusius coined the term *symbioticus* for the purpose of emphasizing the *natural, biotic* aspect of his analysis. The fellows who constitute the living community are the *symbiotici,* and marriage is the *consociatio symbiotica.* Their needs and requirements are the reason for what order is created. This leads to an almost positivist conception of justice, rooted in a naturalist recognition of man's exigencies. At one point Althusius goes so far as to ask: "Who, I ask, could know exactly what justice is if he did not first recognize what is the law? From the law [one learns what is] justice."[21] At another, he cites Aristotle, who in the *Nichomachean Ethics* had suggested that "the question of how husband and wife and generally of how friend and friend shall live together apparently resolves itself into the question of what is just." Justice, in keeping with this notion, Althusius defines as the *virtus symbiotica.* But if we now inquire how that *virtus* is to be discovered, the answer is not reason, as it had been for both Thomas Aquinas and Hooker, but Holy Scripture

20. For this quotation and what follows, see Friedrich, *Johannes Althusius,* pp. lxv ff. However, my views have changed in significant respects. Cf. Friedrich, "International Federalism" in the symposium edited by Elmer Plischke, *Systems of Integrating the International Community* (1963), for an elaboration of the federal aspect.

21. *De Civili Conversation Libri Duo* (1601), p. 11. See for another illustration of the same line of argument *Politica,* XXXV, 1. There is a touch of Marsilius' thought here.

and more particularly the Ten Commandments (VII, 4 ff. and XXI, 22 ff). While Althusius does not, of course, deny what Saint Paul in *Romans* 2:14 had stated as the universal recognition of what is right, the stress is all on the manifest law (as Calvin had taught). To be sure, Althusius wrote that "from inborn inclination, man is by a secret instinct of his nature impelled to do that which he understands as just; and to omit that which he recognizes as unjust" (XXI, 20). This is called conscience and it is implanted in all men by God. Commonly its prescriptions are called moral law (*lex moralis*). But he added that in the words of Christ this "common law" (*commune jus*) is made manifest as that of loving God and loving one's neighbor. More particularly, the second as set forth in the second table of the Decalogue, concerns the just and civil political life; for here man is informed that he should contribute and share with his neighbors those things, works, counsel, and also his right, all of which should be contributed to him in order to remove his indigence and allow him to live comfortably . . . (*"ut contribuat & communicet proximo symbiotico suo res, operas, consilia & jus suum, & omnia illa praeest, quae sunt illi tribuenda ad indigentiam illius sublevandam & commode vivendum*)." For Althusius these are not merely precepts, but explicit judgments and statutes. We have seen earlier that Thomas Aquinas also elaborated the implications of the Decalogue in an effort to spell out the idea of justice. The difference between the Calvinist and the Catholic is merely one of emphasis—greater emphasis here upon the explicitness of the divine commands, less stress upon the role of reason. But even so, Althusius recognizes, as Thomas Aquinas had done, not only the possibility of divine dispensation, but also the need for specific application of this basic law to adapt it to the circumstances of time and place. To illustrate the

point, there follows a long discussion of the Old Testament law, especially Leviticus, culminating in the statement that "in this law what is moral, is perpetual; what is judicial, can be altered in accordance with changing circumstances; what is ceremonial, is perishable, we think" (*"in ejusmodi lege quod morale est, id perpetuum; quod judiciale, id mutatis circumstantiis mutari; quod ceremoniale, id perire existimandum est*)."[22]

It is evident that Althusius' notions on political order apply, strictly speaking, only to a community of Christians, and, I am afraid one must add, Calvinists. Like the Puritans who founded commonwealths in North America, his thinking is even more decisively religious in its making the establishment of a sound political order depend upon the belief in transcendent norms that mold the conduct of men in the way of justice and thus enable them to participate fully in the order which he favors. The charity that animates the Christian believer is the condition for those sympathetic emotions that such an order presupposes. They really believed what is often falsely imputed to Saint Augustine, namely that a Christian commonwealth can be built in which a divinely inspired and radically transcendent justice prevails.

In spite of this insistence upon the religious foundation of the political order, we find that Althusius tends to interpret religion politically, that is to say to subordinate ecclesiastical to governmental requirements.[23] In this connection he stresses his agreement with Bodin on the subject of re-

22. *Politica*, XXI, 40. This subject was a matter of considerable concern to all those Protestants who stressed the *Word* as the basis of faith. Hence Althusius like others, including Calvin before him, devotes the entire next chapter, XXII, to the *Lex Propria Judaeorum* and to the question whether it is useful for a Christian Commonwealth. See his *Dicaeologicae libri II totum et universum jus, quo utimur, methodice complectentes* (1617) which systematized the existing law and co-ordinated and compared it with Roman and Israelitic law.

23. Cf. IX, 41 ff.; XXVIII, 63-66; VIII, 58.

ligious toleration.[24] He more specifically insists that the political authorities have supreme jurisdiction, when minor matters of faith are involved. Referring to Benedictus Aretius,[25] Althusius says that as long as the principal articles of faith are preserved, there is no reason why Christians might not disagree on other matters of belief. All the learned will never agree on such points. The government should try to avoid the development of schismatic movements based on such disagreements. He advocates general moderation, rebuking all those who would disturb the peace by their dogmatism. In thus emphasizing the weakness of human reason, he turns to positive account the "disparagement of reason" that Hooker had criticized in the Puritans. Schools and universities, he believes, can be asked to resolve such uncertainties and decide complicated questions—a device very much in the German tradition. This frank plea for toleration does not, however, extend to unbelievers, to atheists and others whose belief is entirely contrary to the Christian faith. Of these, only the Jewish faith seems to him entitled to limited toleration similar to that extended to "Papists."[26] At the same time, the magistrates are called upon to do

24. The reference is to *De Republica Libri Sex* (158) III, 7: "*Ferenda igitur ea religio est, quam sine Reipublicae interitu auferre non possis. Salus enim Reipublicae extrema lex esse debet.*" (Another passage Althusius refers to is found in IV, 7). In Knolles's translation this reads: "Wherefore that religion or sect is to be suffered, which without the hazard and destruction of the state cannot be taken away: The health and welfare of the Commonweale being the chief thing the law respecteth" (McRae's edition, p. 382). In this chapter Bodin discusses religion in distinctly political fashion, as something that helps to maintain concord, as something that once settled ought not to be called into question or disputed (referring incidentally to the religious Peace of Augsburg, 1555), as something that ought not to be forced, and so on.

25. IX, 42-43. Benedictus Aretius (1505-1574) wrote *Problemata Theologica* . . . (1574).

26. XXVIII, 53-54. Jews may live and do business with the inhabitants of a Christian commonwealth, but they may not intermarry, should not be allowed to build synagogues, and should not be permitted to engage in usury and the like objectionable practices. Needless to say, all this is said with reference to the Jews who confess a non-Christian religion, and has nothing whatever to do with race. On the contrary, the hope is that they, like other unbelievers, will be converted. For the Papists, see 56.

everything in their power to help to promote the true religion. Consequently, that the correction and purging of the church of all error, heresy, idolatry, schismatic corruption belong to the magistrate is beyond doubt. This strongly Erastian position is of course once more reminiscent of Marsilius of Padua, though the purpose is very different, namely, making the commonwealth thoroughly Christian—rather than secure, tranquil, and stable. Hence the magistrate will by public edict eliminate and abolish every "impious doctrine which is not consonant with the word of God," and he will "forbid its exercise to all members of the realm, on pain of severe punishment." Yet, at the same time, the magistrate may order the orthodox to abstain from publicly condemning those who err, and to try rather to cultivate their friendship and to dissuade them. Specifically, he reminds the reader of the inadmissibility of trying to convert people by force; we cannot command religion, because nobody can be forced to believe (*"religionem imperare non possumus, quia nemo cogitur, ut credat invitus"*).[27] Here is the limit of Althusius' willingness to recognize the political function of religion. It is overshadowed by his deep conviction and belief in one particular religion: Calvinist Christianity.

If we now turn to the question of the founding of a political order itself, we find Althusius expounding the idea of a *pactum* that is not a contract, in the sense of later writers, but the fundamental organizing decision of a living group whose common life transcends this organizing act.

27. *Ibid.*, 63. In 64, we are told that *"errantes igitur in religione, non vi externa, vel armis corporalibus, sed gladio spiritus, verbo & armis spiritualibus, per quae Deus potens est . . . regantur. . . ."* Here, too, reference is had to Bodin, *op. cit.*, IV, 7, as well as to various passages in the New Testament. The magistrate must not invade *Dei imperium*; if he does, disturbances and rebellions occur, as has been happening in France, Belgium, Hungary and Poland (65). But having said that much, he reiterates the need of punishing, after inquiry, all *"atheos, epicureos, sectarios, haereticos, seductores."* His is the position of the Presbyterians, rather than that of Milton's *Areopagitica.*

He recurrently admits that the pact may be "tacit," which shows, along with other indications, that this original choice of the people may not be a single act or decision at all. It may be a series of decisions, and it may take the form of tacit consent. But it *can* be an explicit decision. Althusius therefore posits a *potestas constituens,* a constituent power. This power "belongs" to the group itself, since its very life is manifested by it. In it consists the life of the symbiotic group; without it the group ceases to exist. But as has been indicated earlier, the constituent act is not one of previously isolated individuals, but rather one associated with group life. The highest of these groups or consociations, the commonwealth or state, is constituted by lesser entities that were in turn similarly constituted. The members of each higher consociation are the lower consociations. Therefore when the individual citizen exercises his citizenship, he does so either directly on the lowest rung of the ladder of consociations, or indirectly through representatives of the higher consociations of which he is a part (or indeed as one of these representatives.)

The all-inclusive (*universalis*) symbiotic consociation that is the state (*regnum, respublica*)[28] Althusius declares to be the property (*proprietas*) of the people (IX,4). What can that mean when the state is the *consociatio symbiotica universalis*? It means that if the state is the organization of the people for a common life which natural necessity and utility demand, then that state belongs to the people, because without the people there can be no state. And although the territorial state includes all the smaller communities, like families, cities and counties, these communities existed prior

28. For the different terms and their meanings as well as other aspects of this problem, see my *Johannes Althusius,* Introduction, pp. lxxxviii ff. esp. n. 2, p. lxxxix. The Althusian position bears an interesting resemblance to the Ciceronian, as discussed above, chap. i. For the link between property and government, between *dominium* and *imperium,* see the paper by McKeon, cited above, chap. ii. n. 46.

to the state. They were once what the state is now, namely, all-inclusive symbiotic consociations, and they continue to have their communal function, even though they are included in the wider community, and hence constitute a necessary pluralism, as contrasted with the dissolution of all "intermediary" groups (Montesquieu) by the totalitarians. Yet the people appear to be the *coetus*, the mass (*vulgus, plebs*), as contrasted with the body politic or *corpus consociatum*.[29] They have various vices, are inconstant, lacking in judgment, credulous, envious, fierce, turbulent, seditious, ungrateful, and so forth. Althusius is as skeptical about the people as Machiavelli and Hobbes, yet he vindicates the highest power to it. Why?

Since the highest power is a natural attribute of the political community itself, Althusius does not look upon such a community as organized once and for all. It is continually being re-organized, so to speak. This constituent power is indivisible, incommunicable, and inalienable by its very nature.[30] Althusius calls this power the *jus regni*, the law of the state, if you please, adding that it is usually called the *jus majestatis*. It is apparent that this *jus regni* is the law which governs the political order, which orders the body politic. In short, it is the constitution. Through it, the members of the body politic are linked together or united as one people into one body for the purpose of achieving self-sufficiency, order, and law (justice). The constitution directs the actions of all members, single and corporate, and prescribes appropriate functions for them. On that account, this law of the constitution is called the all-inclusive (*universalis*) power of command; it recognizes no superior, equal, or associate. Althusius in this connection points out that the

29. The contrast is explicitly recognized in V, 4 and 23, preface.

30. I have shown, *op. cit.*, p. xc, that Althusius' view must not be confused with the view of those who would distinguish a *majestas realis* and a *majestas personalis*; Grotius maintained a derivative distinction.

expression "the law of majesty" simply means the law of the higher power—higher that is than that attributed to city or province. The political order depends upon this law and vanishes when it disappears. The people, organized into a *corpus consociatum,* possess this power, it belongs to them as the united members organized into natural groupings (IX, 12-17).

If thus we find that the constituent power of the community is virtually unlimited, inasmuch as it "decides" itself what the common welfare requires, we are shown once more to what an extent the organization of the modern constitutional order is anticipated by Althusius. Law, rooted in certain basic principles which are safeguarded by a fundamental law or constitution (*lex fundamentalis*),[31] permeates all human relations in the community. It determines the meaning of justice in any precise sense. This law is constituted by the community and expresses it, politically. When it is a Christian community, such law rests upon Christian ethics, which is not a vague matter of conscience, but is contained in the clearly enunciated commandments of God that are publicly known and understandable to all. Thus, the *communio juris* (I,10; VII,3; X,1), the *Rechtsgemeinschaft,* is fully reliable only among Christians. Constitutionalism presupposes the true faith. Upon the unanimity which such faith provides by determining fundamental values, but more particularly those values which the idea of a Christian man's vocation involves, rests the authority of government.[32]

31. This characteristic term is central to chap. xix. In par. 49 we read: "*In electione vero summi magistratus, summa cura legis fundamentalis regni habenda est. Sub hac enim lege, universalis consociatio in regno est constituta . . . atque ex communi consensu et approbatione membrorum regni sustinetur. . . .*" For the general problems of law, see my Introduction, pp. xciv ff.

32. Concerning "authority," which Althusius interprets in predominantly psychological terms, see chap. xxv. Citing Lipsius, he says: "*autoritas haec est concepta & impressa subditis, sive exteris, opinio reverens . . .*" (par. 1).

We conclude, then, that Calvinism carried forward the position initiated in medieval thought. Whether in its Anglican or its more orthodox forms, Calvin and his followers recognized the political implications of individual conviction in matters of religion and the value of the traditions of feudal pluralism as represented in a government "by and with" estates.[33] Hence "the constitution" became a myth rooted in religious conviction and legal lore. In England, more than anywhere else, this outlook triumphed in such thinkers as Sir Edward Coke, insular and tradition-bound in the extreme, yet also faithful Protestant. It would be illuminating to trace once again how the ancient synthesis broke apart in the revolution, how Oliver Cromwell struggled to retain and realize the general notion of a constitution, while rejecting the particular traditional order of the past, and how eventually a new synthesis was achieved. How this last phase found expression in John Locke's reflections on constitutionalism, we shall sketch in the next chapter. The remainder of this dramatic unfolding of the contradictions inherent in Protestant constitutionalism has been ably described as part of general history.[34]

33. Note Pocock, *op. cit.*, p. 16: "It was natural that those who sought to defend threatened privileges or liberties should emphasize in return that their rights were rooted in law.... Theologians and philosophers might try to equate these rights with reason and nature... but another and no less telling argument was to demonstrate that they partook of the nature of immemorial, sacred custom.... In this way there grew up—or rather, there was intensified and renewed—a habit in many countries of appealing to 'ancient constitution'...." As we have shown, it is not a matter of *either* such an appeal *or* that to religion, but rather theology and its view of justice reinforcing the appeal.

34. For references, see my *The Age of the Baroque* (1952), chap. x; also the works of Pocock and of Wormuth cited above.

CHAPTER FOUR

DEIST AND THEIST CONSTITUTIONALISM

In *The Critique of Practical Reason* Kant observes that religion implies the knowledge and understanding that all duties are divine commands, but that these divine commands are not arbitrary ordinances of an alien will, but essential laws of every free will which must nonetheless be regarded as commands of the highest being.[1] Such a characterization of religion in relation to man and morals is not precisely either deist or theist, but it suggests that both are transcended in Kant's definitive formulation. It depends, of course, somewhat on the meaning attached to these terms. If we take them in their more strictly defined philosophical meaning, theism asserts God to be continually active in the world, operating upon man and nature, while deism lets God create the world and "wind up the clock," providing it with its "laws of motion," but not able to interfere with it. Actually, the position of deism was such that it split off the rational component in such theological doctrines as those of Thomas Aquinas and Hooker and made it the core of "natural" religion. This natural religion is the manifestation of reason as the "natural light"; as such it is common to all men, since it can be discovered and accepted by all of them. This natural light, expressive of innate ideas or common notions, teaches men that God exists, that it is

1. *Kritik der Praktischen Vernunft*, Pt. I, Bk. II, Section II, chap. v; in Cassirer's edition of *Immanuel Kants Werke*, V, 140.

man's duty to worship Him, that this worship is expressed in virtue and piety, that repentance and retribution are divinely ordained and that hence there is a future life (and an immortal soul to live it) which will provide punishment and reward according to man's desert.[2] These innate ideas were, of course, rejected by Locke, who argued from sense experience and man's existence to the existence of God and of moral duties. But what is retained by Locke is the paramount role of reason as the instrumentality with the aid of which sense experience, providing a basis of data, can be made to yield the understanding. Having knowledge of our own existence by intuition and of the existence of God by demonstration, and of other things by sensation, we develop the notions we have of them by reasoning upon these three kinds of existence.[3] Locke therefore argues: "Tho' God has given us no innate ideas of himself; tho' he has stampt no original characters on our minds, wherein we may read his being; yet having furnished us with those faculties our

2. See for this Edward Herbert, First Lord of Cherbury, *De Religione Laici* (1645). "1. *Esse aliquod supremum numen.* 2. *Numen illud coli debere.* 3. *Virtutem, cum pietate conjunctam, optimam esse rationem cultus divini.* 4. *Resipiscendum esse a peccatis.* 5. *Dari praemium, vel poenam post hanc vitam transactam.*" Cited by Locke, *An Essay Concerning Human Understanding* (1790), Bk. I, chap. iii, par. 19. This work will be cited as *Essay*, a capital roman numeral indicating the book, a lower case roman the chapter, and an arabic the paragraph. I have used the sixth folio edition, 1759.

3. *Essay*, IV, ix, 2. On Locke in general, besides the classic treatments of Bourne (1876) and Aaron (1936, 1955), is Maurice Cranston's important book, *John Locke: A Biography* (1957), which is based on much new material and a different image of the man. For the political and constitutional theorist, his *Treatises on Civil Government*, and more especially the second, entitled "An Essay concerning the True Original, Extent and End of Civil Government," have acquired a new perspective due to the editorial labors of Peter Laslett, whose critical edition (1962) also contains a brilliant introduction. Besides the "*Treatises on Civil Government*" (hereafter cited as *CG*), we have, as a result of W. von Leyden's devoted editorial labors, a much fuller view of Locke's views on natural law, or at any rate their origin, from *Essays on the Law of Nature*, ed. Leyden (1954). Leyden's views have not gone unchallenged, however; see the study by J. Yolten, "Locke on the Law of Nature," *Philosophical Review*, LXVII (1958), 477-498. Still, Leyden's learned introduction constitutes an important commentary on Locke's philosophy of law. Finally, mention should be made of J. W. Gough, *Locke's Political Philosophy* (1950).

minds are endowed with, he hath not left himself without witness: since we have sense, perception, and reason, and (*sic*) cannot want a clear proof of him. . . ."[4] Locke is quite insistent on this point: "To shew, therefore, that we are capable of knowing, i.e. being certain that there is a God, and how we may come by this certainty, I think we need go no farther than our selves, and that undoubted knowledge we have of our own existence" (*ibid.*). In his *The Reasonableness of Christianity* he shows this God to be the Christian God of power, justice, and mercy, and the entire discussion is cast in terms of "the state of perfect obedience," which Locke says is "called justice in the New Testament"; he adds "though the word, which in the original signifies justice, be translated righteousness." It is a matter of the "breach" of the law which God had commanded man to obey. There follows a lengthy discussion of Genesis 2 and the problem of redemption which Adam's "fall" raised. Justice, understood as obedience to the law, or righteousness, is at the heart of it. He quotes Revelation (22:14) "Blessed are they who do his commandments. . . ." These commandments "are the manifestation of reason," " 'tis he that commands what reason does"; they are "the laws of reason," which are also "called the law of nature." Yet there is also the "law of faith," and such faith is allowed "to supply the defect of full obedience" and hence gives men "immortality, as if they were righteous." Like Thomas Aquinas, Calvin, Hooker, and Althusius before him (and indeed the entire tradition of Christian natural law), he points to Saint Paul's statement in the letter to the Romans that "the Gentiles do, by nature, the things contained in the law" as a matter of conscience. This in turn leads Locke to recall also the distinction between the moral law, "which is everywhere the same, the eternal rule of right" and the civil, ritual, ceremonial part,

4. *Essay*, IV, x, 1.

which Locke also calls the political part. While the latter obliges only Jews, the natural law, which is the law of reason, obliges all men everywhere. These thoughts spell out what Locke had already adumbrated in his *Essays on the Law of Nature*.[5] In this important early work Locke had been concerned with exploring the rational ground of the law of nature. Arguing from a clear distinction between "reason as the discursive faculty of the mind" and "right reason" understood as a set of moral principles, Locke is preoccupied with (*a*) the question how we know the law of nature and (*b*) what is its binding force.[6] He is concerned to show that the rules of right reason are not "inborn," that they do not embody "innate ideas," but rather that they are "commands of God" which man, with the help of his inborn reasoning capacity, is able to discover. This discovery is not possible for all men equally, but reason is "an essential quality of humanity" and "it is from a merely factual statement concerning man's essential nature that the moral proposition is inferred that he has a duty to live in conformity with his nature." Since neither innate ideas nor tradition can be accepted as sources of true knowledge, there remain only those understandings which reason can derive from the existence of the self and of God, and the knowledge derived from the senses. Divine revelation reinforces the first two, while the third provides the data from which reason can arrive at an understanding of the laws of nature. "From the contemplation of the order and beauty to be found in the world, reason infers the existence of a most powerful and wise Creator." As we have already seen, that

5. See for this early work the edition by W. von Leyden, which gives the Latin text, a translation, and a learned introduction of great value. This work apart, I have greatly benefited from Richard H. Cox's "Locke's Design for Justice" and Raymond Polin's "Locke on Justice," both in *Nomos* VI, *Justice*. Cf. also the latter's *La Politique Morale de John Locke* (1960) and the former's *Locke on War and Peace* (1960), esp. chap. ii.

6. Leyden *op. cit.*, p. 45. See the pages following for what is said in the text. I largely agree with this author. The next quotation on pp. 46, 48.

inference is (in the *Essay*) reinforced by a proof derived from man's own existence.[7] These two proofs, whether valid or not, make God a necessary part of Locke's rational thought on justice; for it this God who makes the laws that reason discovers and obeys when justice is realized. This justice is central to Locke's thinking, more particularly to all his thought on man and government. It provides the basis for his concern with constitutionalism. As has recently been pointed out, when one reads Locke often and extensively one has the strong impression of a constant concern with justice "very reasonable, very considered, very moderate, but also very human."[8]

Before we can proceed with the discussion, we must deal with a claim recently advanced with much learning that Locke is deliberately deceiving the reader about his views and that he is in fact a pagan naturalist of the Stoic persuasion rather than a Christian.[9] It is suggested that Locke is yielding to the "pressures of religious orthodoxy" and is actually disingenuous in citing both the Bible and Hooker. The

7. We cannot here develop Locke's "proof" of God's existence; it turns upon an argument *e contrario*, based upon the premises of eternity, cogitative as contrasted with material being, and the impossibility of creation from nothingness. It was repudiated by Kant, *Kritik der Reinen Vernunft*, ed. Cassirer (*Werke*, Vol. III), I, I. Teil, 2. Abt., 3. Hauptstueck, 5 und 6. Abschnitt (hereafter cited as *KR*, I, I, 2, 3, 5, the page references referring to the Cassirer edition.) These sections are on pp. 416-433 and deal with the cosmological and the physico-theological proof which latter is the first of the above proofs.

8. Polin, *op. cit.*, chap. vii at p. 251: "*Lorsqu'on a pratiqué longuement les oeuvres de Locke, qu'on les a prises et reprises en tout sens, on garde par-dessus tout l'impression d'un grand effort de justice très raisonnable, très réfléchi, très mésuré, mais très humain.*" Polin notes that the word "justice" is infrequent and does not figure in the index of his *Works*.

9. Cox, *op. cit.*, chap. ii. He summarizes his line of argument as taken in this chapter in the article above referred to by the sentence: "That [Locke's] positive teaching, in its turn, progressively reduces the dependence of principles of civil government on religious doctrines until, in the end, civil government is revealed as being grounded only on the desires and rights of men, irrespective of such doctrine." I mention this because palpably the chapter only deals with "The State of Nature and the Law of Nature." The underlying argument that Locke is essentially of Hobbes's opinion has been effectively repudiated by Laslett in the Introduction cited above, n. 3, as it was anticipated by Leyden in his edition.

proposition that "Locke's intention in taking his bearings by the state of nature seems, *on the face of it,* to be a reaffirmation of the teaching of the Bible and Hooker concerning men's condition prior to civil society" is not at all proved by the passage cited.[10] There is indeed a distinctively Lockean outlook and interpretation of these passages, of course, but this outlook is a Christian outlook of the theistic persuasion with deist overtones. It cannot thereby be proved either that Locke is "emphatically secular and naturalistic" or that he wished to "pretend" to be "orthodox." Nothing shows more clearly than his exchange of letters with the Bishop of Worcester concerning his *Essay* that he was fully aware of taking a different, more tolerant stand than the orthodox clergy was inclined to do. We must not forget that in Locke's day it was still a question of genuine concern which is taken truly to be the "orthodox" position, that is to say which is the "right" interpretation of the Bible. As far as I can see, especially from *The Reasonableness of Christianity,* but also from many other passages, especially in the *Essay*'s proof of the existence of God, Locke was an ardent defender of the theist-deist interpretation of the Christian tradition, a believer in God and his justice as a lawmaker for the world and man.[11]

This concern with justice is embodied in Locke's doctrine of the law of nature, *jus naturale, lex naturale* or *naturae,* or as he put it: justice, that paramount law of nature and bond

10. Cox, *op. cit.,* p. 62. The phrasing in the chapter embarrasses one by the inquisitorial atmosphere, conveyed by the repeated use of such adjectives as "surprising," "delicate," "unobtrusive," and "on the face of it." The reference to Josiah Tucker's *A Treatise Concerning Civil Government* (1781) as well as Jonathan Edwards and others of the inquisitorial type is suggestive. The next quotation is from the same source.

11. Henry Sidgwick, *Outlines of the History of Ethics* (1901) and A. J. Carlyle, *A History of Medieval Political Theory in the West,* Vol. I (1903) may not be cited to the contrary, as is done by Cox; their statements refer to specific doctrines, and merely recognize the link with Stoicism which Locke shares with the entire Christian tradition.

of all society.[12] We are justified in assuming that when Locke speaks of the law of nature, he wishes throughout this work to refer to justice, *inter alia.* This law of nature is intimately bound up with the idea of freedom, that is with the idea that all men are both free and equal. "Where there is no Law, there is no freedom," Locke declares apodictically[13] and in line with a long tradition, including Thomas Aquinas, Calvin, Hooker, and Althusius. The proposition is based upon the assumption that "*Law,* in its true Notion, is not so much the Limitation as *the direction of a free and intelligent Agent* to his proper Interest, and prescribes no farther than is for the general Good of those under that Law." That is the reason why "*the end of Law* is not to abolish and restrain, but *to preserve and enlarge Freedom.*" Liberty is the freedom to do as one pleases "under law," that is to act in such fashion as to have one's action be compatible with the similar action of others. This is, as is well known, the view of Kant as well; it puts both thinkers in this respect also in the mainstream of the great Christian tradition. Now the law of nature is an expression of the will of God, who, creating man in His image, has endowed him with reason; for by reason man comes to understand the law of nature. "The *Freedom* then of Man and Liberty of acting according to his Own Will, is *grounded on* his *having Reason,* which is able to instruct him in that Law he is to govern himself by, and make him know how far he is left to the freedom of his own will."[14] Hence, just as in

12. *Law of Nature,* V, p. 168; "*justitia, eximia illa lex naturae et omnis societatis vinculum.*" My own translation.

13. *Second Treatise,* par. 57 from which the following quotations are taken. The quotations follow Laslett, including the italics.

14. *Ibid.,* par. 63. In the intervening paragraphs Locke undertakes to show why children are under parental authority and why it ceases, and why therefore they cannot be said to be under it after they reach maturity. "Thus we are *born Free,* as we are born rational . . ." (61). The argument continues for several more paragraphs to 76. That God's omnipotence can be reconciled with God's will, is asserted by Locke in a number of places, but as Laslett reminds us, "quite how, is never shown. Locke is famous for his confession that this problem was beyond him . . ." (*op. cit.,* p. 93).

Hooker and before, the law of nature is asserted to be the law of reason (I,101), and both are in effect the law of God.[15] Justice, the primordial, paramount law of nature, is therefore something of which all men are capable. For reason implanted in all men, as it is, is a common possession and not the exclusive or paramount characteristic of the elite of the wise, as in many Stoic teachings.[16] And it is this belief in the common man's reasoning capacity that provides the underpinning of Locke's constitutionalism, as it had for constitutionalism in earlier thinkers. However, in Locke and indeed in Kant, the distinctive feature of modern constitutionalism, the recognition and protection of a sphere of independence, receives open recognition: freedom is not only the freedom of participation, but also that of independence. God's law, which is the law of reason and of nature, vindicated it; for unless men can retain a measure of independence, they cannot reason freely, and if they cannot reason freely, they become slaves. This sphere of independence is essentially compounded of two primary aspects: the right of free religious conviction and that of property (in the broadest sense). Indeed, Locke at times uses the term "property" in a sense which comprises life, liberty, *and* the pursuit of happiness by means of all kinds of possessions. His deep conviction about religious freedom finds eloquent expression in his two *Letters on Toleration* as well

15. For, as Leyden rightly puts it, *LN*, 56, for Locke "to affirm that moral principles are deducible from human nature was not to deny that they are God's commands." The same holds for Thomas Aquinas, Calvin, and Hooker. The references to such identification of the "law of God and nature" of scripture and reason are numerous in Locke's work. Note the following references in *CG*: I, 4, 16-17, 56, 60, 89-90, 93, 111, 116, 119, 126, 166; II, 1, 8, 25-26, 52, 56-58, 66, 135, 142, 172, 195. Cox cites the same passages and summarizes some of the contents, but only to discard them as "surface."

16. Stoic doctrine is at times equivocal on this point, but the predominant view, in Cicero as well as others, is elitist as manifested in their notion of a "city of the Wise"—a kind of anticipation of the invisible church of Christian dogma. It is a fascinating dialectic; for the invisible church is an anti-elite, as far as this world is concerned.

as throughout his work,[17] that about property in the *Two Treatises on Civil Government* as well as earlier and later. It is of great importance that the protection of property is the direct consequence of the law of nature and of reason which provided that one must *suum cuique tribuere.*

The protection of the individual's independence seems nevertheless to be put into jeopardy by passages such as this:

> And thus every Man, by consenting with others to make one Body Politick under one Government, puts himself under an Obligation to every one of that Society to submit to the determination of the *majority,* and to be concluded by it; or else this *original Compact,* whereby he with others incorporates into *one Society,* would signify nothing, and be no Compact. . . .[18]

It is, however, important to remember that on one hand the majority of men will in Locke's view be guided by that reason embodied in natural law. The misunderstanding arises from imputing to Locke a radically voluntarist outlook which is quite incompatible with his notions on the law of nature. On the other hand, it must be remembered that Locke's compact is subject to the inescapable reservation that no man can contract away that which he has no power to part with. Like Spinoza, Locke *posits* a sphere of independence which transcends all positive law. What he says on this score is quite unmistakable and unequivocal:

> . . . the *Legislative,* tho it be the *Supreme* Power . . . , . . . is not, nor can possibly be, absolutely *Arbitrary* over the Lives and Fortunes of the people. . . . For no Body can transfer to

17. W. von Leyden, in his Introduction to *Law of Nature,* pp. 21 ff. has shown that "Locke's attitude towards toleration was already defined" in 1559. It constitutes one of the main themes of his political thought.

18. *CG,* II, 97 ff. Extravagant claims have been built upon passages like this. Note especially Willmoore Kendall, *John Locke and the Doctrine of Majority Rule* (1941); it has recently been adopted also by C. B. MacPherson, *The Political Theory of Possessive Individualism—Hobbes to Locke* (1962), who on p. 195 writes of Kendall: "He has made a strong case that Locke's theory confers something very close to complete sovereignty on civil society, that is, in effect, on the majority of the people. Against this sovereignty of the majority, it is said, the individual has no rights. Impressive evidence can be shown for this reading of Locke."

another more power than he has himself; and no Body has an absolute Arbitrary Power over himself, or over any other, to destroy his own Life, or take away the Life or Property of another. A Man, as has been proved, cannot subject himself to the Arbitrary Power of another.... (*CG*, II, 135)

In other words, while very strong within its proper limits, the legislative power is always limited to the public good, which can "never have a right to destroy, enslave, or designedly to impoverish the *Subjects*." Locke would insist upon this for any form of government; he explicitly says that it does not matter whether the supreme power is "placed in one or more" or whether it is always in being or works only intermittently. And whatever it does, this supreme power must do it in the form of law, and may never rule by "extemporary Arbitrary Decrees." It is bound to "dispense Justice." This means that the laws must be "promulgated" and they must be "standing," and the judges who apply them must be "known" and "Authorized." With these highly normative statements, Locke continues the tradition of Aquinas and Althusius: only a government according to law is a political order; absolute arbitrary power is inconsistent with the "ends" of society and government, and men would never "quit the freedom of the state of Nature for it" (*CG*, II, 137). They do so only because they wish to "preserve their Lives, Liberties and Fortunes." "Stated Rules" are needed "to secure their Peace and Quiet." Hence the supreme power "*cannot take* from any Man any part of his Property without his own consent." Locke at once points out that any such arbitrary action "is not much to be fear'd in Governments where the *Legislative* consists, wholly or in part, in Assemblies which are variable." In short, a good government provides for a division of the legislative power, and a periodic return of those participating in it to the status of ordinary citizens "subject under the common Laws of their Country,

equally with the rest." Such division of the legislative power so that it is subject to "checking and balancing" is, of course, the quintessence of constitutionalism. Regularized restraint of the exercise of governmental power for the protection of the person and his property is the consequence of Locke's transcendent belief in justice.

The essential condition for such protection is, therefore, the establishment of constitutional government. Justice, transcendently rooted in the rational will of a just and beneficent God, is the very order of human nature which develops not as a result of causal determination, but is achieved by man himself in conformity with his law—the law of his nature and of his reason.[19] In order that justice may be realized, man must be free in the more specific political sense we have just indicated, because that freedom is possible only within the context of a constitutional order. Contrary to the Commonwealthmen who would restrict the term "commonwealth" to such a constitutionalism,[20] Locke uses the term for any kind of political order, like the Latin *civitas*. However, the very notion of a political order is itself normatively restricted in the direction of constitutionalism. Only a government according to law is permissible; absolute arbitrary power means tyranny, and like Thomas Aquinas and Althusius, Locke defines tyranny very broadly as "the exercise of Power beyond Right" (*CG*, II, 199). And this statement is in turn elaborated as meaning that someone uses the power he has (and it may indeed be a popular assembly) "not for the good of those, who are under it, but for his own private separate Advantage." In this connection Locke once again juxtaposes will and law, that is to say reason, thereby staying in the great tradition of transcendent justice.

19. Cf. Polin, *op. cit.*, p. 252, and the entire chap. vii.

20. For a recent skilfully compiled documentation and a good introduction, see Charles Blitzer, *The Commonwealth of England, 1641-1660* (1963); see also my *The Age of the Baroque* (1952), chap. x and the literature given there. See CG, II, 133.

In short, the notion of human rights is closely linked with and institutionally expresses Locke's transcendent notion of justice as embodied in natural law. Was this the result of a failure to appreciate Hobbes's argument concerning right and law? Hobbes is generally credited with having first made explicitly clear the difference between natural law and natural right. In a famous proposition he argued against those who "confound *Jus*, and *Lex*, *Right* and *Law*." He pointed out "that they ought to be distinguished; because *Right*, consisteth in the liberty to do, or to forbeare; Whereas *Law*, determineth, and bindeth to one of them."[21] Man's right to all things, even the dominion over his fellow men, however, is limited by his lack of power, and he enters a political order, a commonwealth, in order to have security and peace by "conferring all his power" upon one man or an assembly of men, unconditionally and without the retention of any rights, except that of life in the sense of physical survival; if that is threatened by the sovereign, man returns to his prior condition and presumably reacquires all his rights. Rights, then, in Hobbes's proper understanding do not exist, once the commonwealth has come into being and a sovereign exists. And yet, if one merely takes his original definition as a starting point, then in a constitutional order the rights appear as "liberties" defined by law, especially the constitution. Indeed, the Hobbesian starting point provides a suitable basis, an arguable common ground for the underlying similarity of rights, liberties, and freedoms, as they have evolved historically. Absolute rights, that is rights independent of any political order, can be possessed only by an all-powerful being; even the sovereign has only those powers that are conferred upon him by agreement of

21. Thomas Hobbes, *Leviathan*, chap. xiv. Cf. also chap. xxxxi, where we are told that God's "right of nature" is "derived from his irresistible power" and hence is without limits.

the subjects among themselves,[22] war and peace, legislation, adjudication, and so forth. More particularly property is understood as the outcome of laws made by the sovereign and hence as politically established. But since Hobbes had defined a *natural* right as "the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature," he cannot consider anything except the right of self-preservation a natural right once men have entered the communal political order he calls a commonwealth.

Very differently John Locke. He, too would start with the right of self-preservation. In a famous passage in the *Second Treatise,* he argues that man cannot be supposed to have given up "what he does not have the power to part with," and therefore men have a right to preserve "this fundamental, sacred and unalterable law of self-preservation."[23] Superficially, Locke's position seems no different from Hobbes's, but actually there is a great difference, and it lies in the different conception of the *self.* While in Hobbes this self is nothing but the bodily existence which man's fear of violent death is concerned with, Locke conceives the self as possessed also of a spiritual existence, manifest in his liberty and the property, which includes all man's works. Hence the right of self-preservation ramifies into all those rights which the Bill of Rights of 1689 specifies, and the *constitution* becomes the bulwark of these rights, because it defines the powers of government and none of the established powers have any "manner of authority, beyond what is by positive grant and commission delegated to them." If any of them transgress this their power, they must be for-

22. *Leviathan,* chap. xvii. Hobbes defines these powers by paraphrasing the traditional *jura majestatis.*

23. *CG,* II, 149. Cf. my paraphrase in *Constitutional Government and Democracy* (1950), p. 130, where the issue of an "inherent" right is transformed by relating it to the constituent power. Leo Strauss, *Natural Right and History* (1953), obscures the sharp difference, because he identifies the self in Hobbes and Locke; they are quite different.

cibly removed; for "in all states and conditions the true remedy of force without authority is to oppose force to it." The ground for this vigorous assertion of man's basic rights is that "the use of force without authority always puts him that uses it into a state of war as the aggressor, and renders him liable to be treated accordingly" (*CG*, II, 155). It is in this sense that rights may be said to be inviolable. Their exercise may be prevented and thus people may find themselves incapable of exercising them, but they remain their rights just the same.

It does not seem necessary to go further into the way in which Locke works out his doctrine of constitutionalism, more especially the details of the separation of powers. It is familiar ground, especially in the transformed rationalization given it by Montesquieu. Locke presents it as a universalized generalization of the British constitutional tradition prior to the separation of an independent judicial power, but these are issues which are not particularly germane to the task in hand. Before we turn to Kant and the further and final step he took in providing a philosophically grounded religious basis for transcendent justice, it might be well to state explicitly the contribution which Locke's political philosophy embodies. It is to be found in the theistic conception of the deity. While revelation is recognized as an important source of justice, the emphasis has shifted to reason, the stress is on the reasonableness of Christianity. The existence of God can be proved by human understanding, and the core of a reasonable Christianity summarized in the one article of faith: Christ is the Messiah. Orthodoxy has been left far behind, but in this rationalized version of Protestant Christianity the doctrine of toleration has emerged as the residual article of conviction. The separation of church and state is consequent upon it and incorporated

in a constitutionally protected freedom of religion.[24] Such freedom may, and in the early period is, hedged in by considerable restrictions. The exclusion of atheists we found in Althusius is retained by Locke. In the *Constitutions* we read that "no man shall be permitted to be a freeman of Carolina or have any estate or habitation in it, who does not acknowledge a God or that God is to be publicly worshipped."[25] This statement, as likewise Locke's discussion of God in the *Essay* and elsewhere, does not provide a clue as to the precise nature of his views. A recent learned biographer has told us that

> Locke was always and essentially a deeply religious man, a fact which is sometimes not appreciated because he spent so much energy and time attacking orthodox religion. His religion was that of the Latitudinarian wing of the Church of England. His creed was short, but he held to it with the utmost assurance. Latitudinarianism was primarily the religion of the minimal creed. Its exponents did not specifically challenge more than one or two Christian dogmas . . . but neither did they give specific assent to more than one or two dogmas. They demolished the basis on which most dogmas rested and then remained discreetly silent.[26]

Whether or not we accept this estimate wholly, it would suggest that Locke was a theist rather than a deist. It seems doubtful that the question will ever be fully resolved; but there are quite a few statements in the *Essay* and elsewhere that would suggest this conclusion.

But there is also current a more historical view of deism as a movement in the seventeenth and eighteenth centuries.

24. *The Fundamental Constitutions for the Government of Carolina*, esp. art. 97. Locke co-operated in drafting these plans.

25. On the evolution of the idea of toleration in England, see W. K. Jordan, *The Development of Religious Toleration in England* in four vols. (1932, 1936, 1938, 1940). The treatment extends to 1660 and does not include John Locke.

26. Cranston, *op. cit.*, n. 3., pp. 124-126. Cranston adds at the end of his discussion of latitudinarianism and Cambridge Platonism the wise comment: "Locke never made the same mistake (as the Platonists) of looking to philosophy for an emotional substitute for religion" (p. 128).

When seen in this perspective, deism stresses rational as contrasted with revealed religion, Christian doctrine being rationalized and the role of reason in religion increasingly stressed. Latitudinarianism had a considerable link with deism as thus understood, and a statement by Benjamin Whichcote (1609-1683) highlights it: "There is nothing so intrinsically rational as religion is, nothing that can so justify itself; nothing that has so pure a reason to recommend itself."[27]

It is from rational religion and its unlimited faith in reason that Kant revolted when he undertook critically to examine and define the "limits" within which reason could be expected to operate effectively.[28] His philosophy, a "critical rationalism"—I have argued this to be a better designation of his position than "idealism"—provided the final formulation of a doctrine of transcendent justice as the foundation of constitutionalism. In a most revealing sentence, limiting the conscience to the will, Kant says that "whether an action is right or wrong, is a question to be judged by reason (*Verstand*), not by conscience."[29] Conscience is the power to judge oneself morally ("*die sich selbst richtende moralische Urteilskraft*") and to listen to it is a duty. In this perspective, religious persecution is condemned, because it is lacking in

27. Benjamin Whichcote, *Moral and Religious Aphorisms* (1753), n. 457.

28. Kant's works are here cited according to Ernst Cassirer's splendid edition, *Immanuel Kants Werke* (10 vols., 1922). For his general background and a competent analysis, see Vol. II of this edition, entitled *Kants Leben und Lehre* (1923). The Kant literature is, of course, vast. A. D. Lindsay's *Kant,* (1934) and N. Hartmann, *Die Philosophie des deutschen Idealismus,* Vol. I (1923), are authoritative. In spite of numerous translations of individual works, no critical edition of his works in English exists. I have tried to provide some unity in my *The Philosophy of Kant* (1949), which contains selections from many of his works in reasonably uniform style. L. W. Beck's edition of the *Critique of Practical Reason and Other Writings in Moral Philosophy* (1949), also provides good translations.

29. In *Die Religion innerhalb der Grenzen der blossen Vernunft,* Pt. IV, Section 2, par. 4 (*Werke,* as cited, VI, 336). Kant in this connection recalls the old saying: when in doubt, don't ("*quod dubitas, ne feceris*"—Plinius), showing that this saying refers to moral scruples, not to expedient concern, as now frequently understood.

conscience to condemn a man in a matter which permits of some doubt. Nonetheless, God exists. Kant said in an early work:

> The experience of accidental things cannot provide a sound ground of proof for the existence of Him whose non-existence is impossible. The difference between His existence and that of other things is to be found in this that the negation of God's existence is complete nothingness . . . if you don't believe [this proof] then leave this uneven footpath and turn to the wide road of human reason. It is very necessary to convince oneself of the existence of God; it is not equally necessary to demonstrate it."[30]

By what road, then, are we to arrive at justice, that is to say at firm judgments as to what is right? There can be no right without justice, and no justice without publicity. "Every claim of a right must be capable of being made public," and the transcendent formula which Kant suggests for testing such a right's rightness is that "all actions which are related to the right of other men are unjust, if their maxim is not compatible with publicity." But is this the only standard? Are there not grounds of a different sort which come into play in any effort to determine what is right? Kant believed that morality was independent of religion, that it springs directly from a man's freedom, as argued in his *Critique of Practical Reason*.[31] Kant's argument culminates in the famous "categorical imperative," which Kant calls the "basic law" of pure practical reason. It asks that a person act in such a way that the maxim of his will can be considered valid as a principle of general legislation. Passing over the ex-

30. At the end of *Beweisgrund zu einer Demonstration des Daseins Gottes* (1763); in the preceding text, he had insisted that the ontological is only a 'logical' proof.

31. *Kritik der Praktischen Vernunft*, in *Werke*, V, 1-176. A good English translation is found in Lewis White Beck's edition of 1949. I am using my own slightly different translation. For a learned discussion of the complexities of the concept of the categorical imperative, see H. J. Paton's *The Categorical Imperative* (1948).

tended critique of the "formalism" implied in such a "law,"[32] we must note that it rests upon a belief in freedom which expresses itself in a will that is not determined by concrete (*material*) considerations. And yet Kant recognizes that "by the concept of an highest good, which is the object and the final end of pure practical reason, the moral law is led to religion, that is to the understanding of all duties as divine commandments." These divine commandments in turn are, as already noted, not arbitrary orders of an "alien will" but laws of every free will for itself. They must nevertheless be regarded as commandments of an highest being, because we can hope to secure the highest Good only from the will of such a being, morally perfect, holy, benevolent, and all powerful. The moral law demands that man make the highest good the object of all his behavior. This he cannot hope to accomplish, except by having his will accord with that of an holy and benevolent Creator. One's own happiness is comprised within this highest Good, understood as the greatest measure of moral perfection, but the moral law, rather than a man's own happiness, must determine his will. In this connection it is well to recall an earlier and less formalistic formulation of the categorical imperative, which ties in with Kant's defense of a government according to law and constitutionalism. It reads: "Act in such a way that you are using man, whether it be in your own person, or that of any other, at all times as an end itself, never merely as a means."[33] There is here implied an insistence upon the autonomy and dignity of *all* men that renders suspect any form of government which fails to provide for the participation of all men in the determination of the law. Only such participation can insure men against their

32. The most comprehensive of these critiques is contained in Max Scheler, *Der Formalismus in der Ethik und die Materiale Wertethik* (1916).

33. *Grundlegung der Metaphysik der Sitten,* Sec. 2 (*Werke,* IV, 287). For an elaboration of what follows, see my *Inevitable Peace,* chap. vi, esp. pp. 174 ff.

instrumental abuse. The categorical imperative in its hortative form offers an underpinning by interpreting man's moral judgments as being, in effect, general legislation. If most men, in acting morally, do in effect legislate, it follows that their several wills will in practice coincide. Thus Rousseau's perplexing and intrinsically anti-constitutional doctrine of the general will, implying as it does a concentration of unconstrained power, is transformed into a constituent power made rational by the coincidence of the individual wills composing it. But unfortunately, this solution applies only normatively, applies, that is to say, only on the presupposition that men act in accordance with the categorical imperative. This they do only intermittently, a fact which does not particularly trouble Kant, as far as his theory is concerned, because the whole argument rests upon a separation of the theoretical and the practical, of the *is* and the *ought*, of the *phenomena* and the *noumena*, of fact and value. These realms seem so far apart that no bridge of judgment is able to join them. Actually, Kant himself bridged the gap in a theory of organic existence, functions of organization and creativity, in short, teleology.[34] It is a critical evaluation of the use of "judgment" in those situations which are neither strictly determined nor wholly free. Teleological judgment is concerned with purpose, evidently, and the exploration of such purposes yields insights which link the realm of freedom with the realm of necessity through an understanding of how freedom is actualized in the world of sense ruled by cause and effect. It yields an understanding of the seeming paradox of a freedom by which man imposes obligations on himself. Only such an

34. *Die Kritik der Urteilskraft* (1793), in *Werke*, V, 233-568. This work has been hailed as the "crowning achievement" and denounced as contradicting the other two critiques. It is perhaps more pertinent to observe that this critique completes the Kantian "critical rationalism" in terms of medieval rationalism. Richard McKeon kindly suggested that this point be included in my analysis.

understanding provides a full grasp of the meaning of constitutional liberty as the mutuality of rights and duties (see chapter V).

In spite of this "bridging of the gap" Kant holds that the distinction between two kinds of propositions, the descriptive and the normative, has an ontological dimension: two separate worlds are posited, the world of necessity of the natural man and the world of freedom of the moral man. Law and justice are part of this latter world, of course. "Since the concept of law is a pure one, but is oriented toward practice, that is to say, to the application to cases which occur in experience, a metaphysical system of law would have to take account of the empirical many-sidedness of cases." Because this is impossible, one can develop only principles and not a complete system of law as a part of morals.[35] Kant considers it the duty of everyone to possess such a metaphysics of morals, and believes that every man in fact possesses it, "although ordinarily in a dark manner." Kant distinguishes, however, between ethical and juristic norms, the ethical norm resting as we have seen upon conscience and the "inner forum." Apart from conscience, every action is legal that is according to law. "The theory of law and the theory of virtue are not distinguished by their different duties but rather by the difference of the legislation. . . ." But while distinct, these spheres are not wholly separate. In the center of his legal theory Kant places the "highest principle of morals," the categorical imperative. A law, therefore, is a proposition which contains a categorical

35. Based upon the *Grundlegung*, as well as the *Kritik der Praktischen Vernunft*, Kant's legal philosophy forms the first part of his *Metaphysik der Sitten* (1797), *Werke*, VII, 1-180. Hans Kelsen built his "pure" theory of law upon the Kantian dichotomy of fact and norm, but unlike Kant in the above quotation sought to extend it to the "empirical many-sidedness of cases"—a questionable procedure to say the least. Cf. my *The Philosophy of Law in Historical Perspective* (1963), esp. chap. xiv, pp. 171 ff. where detailed references to Kelsen can be found. The quotations in the text above are from the *Metaphysik* . . . , pp. 17, 14, and 31.

imperative or, more precisely put, a law contains a command in keeping with and derived from the categorical imperative. Law in its totality comprehends all such commands. "The law is therefore the totality [*Inbegriff*]of the conditions under which the arbitrary preference of one may coexist with the arbitrary preference of another according to the general law of freedom." Justice is the concept by which the internal and the external legislation are linked. The triad of the Roman law, which had expressed the idea of justice, understood as natural law and reason, is made the starting point of Kant's theory of law. These principles suggest, according to Kant, a division of law into internal and external legal duties, and their derivation one from the other. But at the heart is the one innate right of freedom, understood as independence from the arbitrary determination (coercion) by another. "It is the one and only original right which belongs to each man by reason of his humanity."[36] From this right and law of freedom flow the duties of the law: first, to maintain one's dignity and honesty as a man, which is the law of "being just" (*lex justi*), secondly to do no one a tort (*lex juridica*), and finally to enter into a relation (*Zustand*) with others in which everyone's own is secured against every other (*lex justitiae*). From these laws and more particularly from the third law, that of justice, Kant derives the division of mine and thine. "The lawful and rightful mine (*meum juris*) is that with which I am so closely bound up that the use which another might make of it without my permission would hurt me. Possession provides a subject with the possibility of such use." It is readily apparent that this theory very closely resembles that of Locke, and the alleged independence from its deist religious mooring is a delusion. For the external duties are subsumed under the internal ones, and the internal ones flow from man's humanity, and man

36. *Metaphysik, loc. cit.*, pp. 38-39. The next quotation is from p. 47.

qua man is a creature of God whose one and only basic right, freedom, manifests the divine spark. The deeply religious approach of Kant is characteristically revealed in the famous exclamation at the conclusion of the *Critique of Practical Reason*: "Two things fill the mind with ever new and increasing wonder and awe . . . the starred heaven above and the moral law within man."[37] This moral law can be subjected to careful scientific scrutiny which is able to demonstrate man's intrinsic worth as a personality.

This insistence upon the autonomy and worth of *all* men renders suspect any form of government which fails to provide for the participation of all, to repeat what he said at the start of this part of our analysis. "The idea of a constitutional order is sacred and irresistible. It is at the same time an absolute commandment to every people imposed by practical reason when it judges according to the concepts of law and right [*Rechtsbegriffe*]." Such a constitutional order may be monarchical, though it "tends" toward a republican frame. A monarchical constitutional order exists by analogy, when a people is governed by laws which are analogous to those a people would give itself when acting according to general principles of right and law.[38] Even though a monarchy, it is a government according to law—a basic law of the constitution providing the foundation. In many different contexts Kant returned to the proposition that "the will of all is the source of all law," and "the general will of the people without regard to person must be made the basis" of all right law, or again that "the state is a people which governs itself." Justice defined in terms of each person's freedom coexisting with every other's freedom is evidently likely to be realized only in a constitutional order.

It is interesting to test the Kantian insistence upon the

37. *Werke*, V, 174.
38. *Der Streit der Fakultaeten*, 2. Abschn. *Werke*, VII, 400. This section deals with the argument between the philosophical and the law faculty.

absolute claims of a moral law of freedom, institutionalized in a constitutional order, by reference to the problem of survival. Such constitutional "reason of state," confronted with a conflict of the commandments of the moral law and the requirements of an emergency, will tend to intensify the constitutional morality in periods of stress and strain. Take the rule of *pacta sunt servanda,* a well-known principle of classical natural law doctrine. Spinoza once wrote that "we may conclude that a compact is only made valid by its utility, without which it becomes null and void . . . everyone has by nature a right to act deceitfully and to break his compacts. . . ."[39] Nothing could be further from the position of Kant, who argued specifically against any right to lie—ever. In keeping with such rigorous transcendency, Kant would reason that the *pacta sunt servanda* rule is valid and based upon the categorical imperative, since its opposite could certainly not be made a principle of general legislation. The general rule may, however, be subordinated to a still more general rule, namely that of self-preservation, i.e., of the security and survival of the constitutional order itself. Does it mean a rejection of the rule? By no means! Rather the sanctity of treaties becomes itself linked to the survival of the constitutional order. A constitutional order, a government according to law, cannot survive except by means of the scrupulous observation of the law; its success can only mean such observation. In his radical moralism, Kant is inclined to say that if a certain line of conduct is right it may be presumed to have the potentiality or even the likelihood of succeeding. Because pacts must be observed, peace must be organized. "Civic freedom cannot now," he wrote in 1784, "be interfered with without the state feeling the disadvantage of such interference in all trades . . . and as a result

39. *Tractatus Theologico-Politicus,* chap. xvi. (Elwes translation, 1900, p. 204).

a decline in power. . . ."[40] Hence even "war will eventually become a very dubious enterprise . . . other states will offer themselves as arbiters, urged on by the danger to themselves . . . and thus promote a future great body politic without precedence in the past. . . ." The ultimate reason of state of constitutionalism is a world constitution, a universal federation under law. This conclusion was the logical one to draw if the problem of security and survival was to be solved within the context of constitutionalism.[41] It projects it into the future, as a developmental model, and an institutional implementation of one of the derivative principles of the categorical imperative: "There shall not be War." Whether it holds, once the transcendent ground for the justice in freedom is denied, is another and open question.

40. *Idee zu einer allgemeinen Geschichte in weltbuergerlicher Absicht*, 1784, in *Werke*, IV, 151 ff. The quotation at p. 162; the following one at 163.

41. For an elaboration, as well as the historical background, see my *Constitutional Reason of State: The Survival of the Constitutional Order* (1957), esp. pp. 86 ff. Cf. also *Inevitable Peace*, chap. ii.

Chapter Five

RIGHTS, LIBERTIES, FREEDOMS: THE HUMANIST CORE OF CONSTITUTIONALISM*

When the American constitution makers at Philadelphia drafted the basic charter of the United States, the idea of natural rights had already become firmly implanted. What the English Declaration of 1689 had broadly suggested, had become embodied in some of the colonial constitutions. Partly in deference to such local affirmations of the constituent power, understood as popular sovereignty, but also because the crucial significance of these rights had not been fully grasped, all but some of the ancient procedural rights (*habeas corpus*, petition, jury) had been omitted from the original constitution. The conviction that a constitution must protect the individual against the government by a bill of rights, was so generally shared, however—and it was reinforced by the French revolution—that such a bill had to be added forthwith. Constitutions thereafter have almost always contained such a bill of rights; in the case of the Third Republic in France it was argued by some, notably the great Duguit, that in the absence of such a bill the Declaration of 1789 ought to be considered valid law.

Into these bills of rights has been distilled, so to speak, the religious element of constitutionalism, that is that no-

* This chapter is an altered version of an article in the *American Political Science Review*, 1963, entitled "Rights, Liberties, Freedoms—A Reappraisal."

tion of transcendent justice sketched in the preceding pages. For the rights were considered "natural," because they were seen as expressive of human nature, and that view of human nature was derived from Christian ethics, even when embodied in such secularized versions of man as were offered, e.g., by Thomas Paine.[1] It seems, therefore, a fitting conclusion to these essays to explore the evolution of the notion of human rights since the eighteenth century, especially in the United States.[2]

The English language mirrors this evolution in the three terms of rights, liberties, and freedoms. Natural rights, as inherited by the eighteenth century from the seventeenth, and summed up in the Lockean formula of "life, liberty and property" (broadened to include the pursuit of happiness,[3]) were, to repeat, largely concerned with protecting the individual person against governmental power. Each man was seen as entitled to a personal (private) sphere of autonomy, more especially of religious conviction and property; the inner and

1. Carl J. Friedrich and Robert G. McCloskey, *From the Declaration of Independence to the Constitution: The Roots of American Constitutionalism* (1954); Carl J. Friedrich, "Rights, Liberties, Freedoms," *University of Pennsylvania Law Review*, XCI (1942), 312 ff.

2. From the vast literature on human rights, the following might be selected: H. Lauerpacht, *International Law and Human Rights* (1951); B. Mirkine-Guétzévitch & M. Prélot, "Chrestomathie des Droits de l'Homme" *Politique* (1960), containing a number of essays of historical and comparative outlook; Zechariah Chafee, Jr., *Three Human Rights in the Constitution* (1956); the same: *How Human Rights Got into the Constitution* (1952); Chafee has also published a collection entitled *Documents on Fundamental Human Rights* (3 pamphlets, 1951-1952); Roscoe Pound, *The Development of Constitutional Guarantees of Liberty* (1957); in 1959 a report was published of the United States Commission on Civil Rights and an abbreviation of it under the title *With Liberty and Justice for All*—this report concentrates on voting, education, and housing, i.e., in our terminology, one civil liberty and two social rights on freedoms.

3. Carl L. Becker, *The Declaration of Independence* (1951); Ursula M. von Eckhardt, *The Pursuit of Happiness* (1959). It continues to be the concept of many, e.g., Mr. Justice Hugo L. Black, who in his recent contribution to a collective volume entitled *The Great Rights*, ed. Edmond Cahn (1963), speaks of rights as provisions that "protect individual liberty by barring government from acting in a particular area or from acting except under certain prescribed procedures" (p. 43). That was precisely the formula of the French *Declaration* of 1789.

the outer man in his basic self-realization and self-fulfilment. These rights depended in turn upon the still more crucial right to life, that is to say to the self itself in terms of physical survival and protection against bodily harm. This right to life was recognized even by absolutists, like Thomas Hobbes. It was believed immutable, inalienable, inviolable.

In the course of the nineteenth century it gradually became clear that such rights were not something absolute and unchangeable. As the rationalist beliefs of the preceding age acquired historical perspective, rights were recognized as constitutionally created and guaranteed. Comparisons of different "bills of right" reinforced the conviction that such rights varied from time to time and from place to place. Their adoption was seen as not merely an act of recognizing them, but of formulating and establishing them. To be sure, such a view was to some extent anticipated in the English and French revolutions at the height of revolutionary agitation, and the citizen's participation in government was, of course, a key claim from the outset. Natural rights thus gradually were transformed into "civil liberties," the range of activities of the citizen. This transformation was, of course, closely linked to the forward march of democratization, and a marked shift in the assortment of such rights occurred, as the right to vote and participate in government and public policy formation became generally recognized and extended to the underprivileged and to women. Freedom of religion became broadened into one of conviction, and academic freedom, the freedom to teach and to learn, was recognized even in countries where such participation was restricted, such as Germany and Austria-Hungary. In the more advanced democratic countries, those rights which served the political function of better enabling the citizen to participate, freedom of the press, of assembly and of association, often summed up in the general freedom of expression,

moved into the foreground of attention, while the right of property was subjected to restrictions and limitations arising from the widely felt need for greater social control and for restraining the concentration of economic power.

These civil liberties, vigorously advocated by progressive forces, often seemed to transcend the individual and his personal interest to such an extent that groups were brought into being, such as the American Civil Liberties Union, which lent their organized support to the defense of individuals otherwise unable or unwilling to protect themselves. Civil liberties were the key issue of such writings as John Stuart Mill's *Liberty*—the classic statement of the libertarian doctrine in terms of social utility. Liberalism in its broadest connotation was the belief in these civil liberties and in the need for constitutionally protecting them.[4] This belief became, of course, associated with a great many more specific issues, political, economic, and social; and it is therefore possible to see these rights merely as rationalizations for a class interest, as Marx was inclined to do. As against this one-sided analysis—for it contains an element of truth—the notion of civil liberties was grounded in the conviction that freedom required social and political organization which would overcome both natural and man-made obstacles to the realization of individual freedom. Bentham's view of democracy as the way to have all individuals participate in shaping the conditions of such freedom influenced (as it represented) a widespread belief.[5]

Freedom of independence was being crowded by freedom of participation. This freedom of participation was actually the older of the two. In the Greek cities it was this

4. John Stuart Mill, *On Liberty* (1861); and Volume V of *Nomos*, entitled *Liberty* and devoted to an exploration of Mill's thought; note also that the definition given is of course not meant to be an exhaustive one; cf. my *Constitutional Government and Democracy* (1950), pp. 428 ff.

5. Maurice Cranston, *Human Rights* (1963); see also Leonard Krieger, "Stages in the History of Freedom," *Nomos* IV (1962), for perspective.

freedom rather than that of a personal sphere which had inspired such noble utterances as Pericles' Funeral Oration. The freedom of self-determination of "peoples" which the Draft Covenant of the Human Rights Convention of the UN proclaims in its article 1 (though it is not included in the Universal Declaration) is a modern version of this ancient freedom of classical Greece: the freedom of each man to live under a government belonging to the same parochial group as he himself does and to participate therein. One must not allow oneself to be misled by the collective form of this freedom to exclude it from the civil liberties. It is the civil liberty par excellence[6] and closely related to the freedom of participation and its collaterals. That this freedom may collide with and at times even negate other freedoms is undoubtedly true. But there are and always have been conflicts of principle between different liberties. If it is argued that the personal rights of the inhabitants of former colonial territories were more firmly protected by the colonial power, say by contrasting Hongkong and Ghana, or Morocco before and after French domination, the answer will be that the right of self-determination is a paramount right placed today by many persons ahead of all personal rights.

Civil liberties, including the right of self-determination, have however in the twentieth century been rivaled not only by the older personal rights, but also by the *freedoms* suggested in Roosevelt's proclamation of The Four Freedoms and embodied in quite a few of the postwar constitutions as well as the United Nations' Universal Declaration of Human Rights.[7] These new freedoms are rights of an economic and social character which characteristically involve collective and

6. Cranston, *op. cit.*, pp. 66 ff. does not wish to admit this, but argues to the contrary. A similar position adopted by Isaiah Berlin, *Two Concepts of Liberty* (1958), pp. 44-45; a "hybrid form of freedom." Actually, it was already recognized during the French Revolution, following Rousseau.

7. Arts. 22-28.

more especially governmental effort. Among these rights are the right to social security, to work,[8] to rest and leisure, to education, to an adequate standard of living, to participation in cultural life, and even to an international order insuring these rights. Some of these rights which have come into prominence in the twentieth century actually appeared among other "natural" rights at an early date. Thus the French Declaration of May 29, 1793, declared in its article 22 that "education is the need of all and society owes it equally to all its members." This Declaration also clearly faced the need for government action; in its article 24 it asserted that the national sovereign (i.e., the people) must guarantee enforcement of such rights. But the emphasis at that time and especially after the revolutionary fervor had subsided was upon the rights *against* the government and as the nineteenth century progressed toward democracy, upon the rights *within* the government. Only in the twentieth century has the full significance of these social and economic rights become manifest.[9]

Such rights are obviously not protecting the individual *against* the government or other powerwielders, but call upon the public powers to see to it that such liberty as man possesses by himself is implemented by another set of freedoms, which in contrast to those of independence and par-

8. The right to work is actually not new; it was explicitly urged even before the French Revolution by Turgot, who in the *Edit sur l'abolition des jurandes* (1776), wrote: "*Dieu, en donnant à l'homme des besoins, en lui rendant nécessaire la ressource du travail, a fait du droit de travailler la propriété de tout l'homme, et cette propriété est la première, la plus sacrée et la plus imprescriptible de toutes.*" It appears in Robespierre's proposal of a restatement of the *Droits de l'homme et du Citoyen* of April 24, 1793. See for these texts "Chrestomathie des Droits de l'Homme," in *Politique: Revue Internationale des Doctrines et des Institutions,* (1960), Nos. 10-13, pp. 179-180 and 248. The classic *Declaration* is reprinted there on pp. 246-249. In this collection is also found the next *Declaration* of 1793. Cf. for contrast the interesting paper by Robert M. McCloskey, "Economic Process and the Supreme Court," *The Supreme Court Review* (1962), pp. 34 ff.

9. *In The Great Rights,* ed. Cahn (1963), the distinguished authors still largely operate with that notion, especially Mr. Justice Black.

ticipation may be called freedoms of creation. They are rights which provide man with the freedom from fear and the freedom from want, that is to say they liberate him from restrictions and inhibitions which hinder his full development as a human being. While radically different from the older freedoms, they are nonetheless rightfully claimed for all men *qua* men. When Anatole France wrote his bitter quip about every Frenchman's freedom to sleep in the open under the bridges over the Seine, he was asking for such implementation. It is no longer permissible to brush these rights aside as less basic than the earlier ones, or to question them, because of the difficulty of effectuating them. All rights contain norms, and all norms fall short of their enforcement—if it were otherwise, why would norms be needed? No one insists that the law that all men must breathe be enforced by appropriate enactments. It is unwise to ridicule these economic and social rights, because at times the drafters of such bills are carried away by their humanitarian enthusiasm and provide for "periodic holidays with pay" or for "enjoying the beauties of nature."[10] Such extravaganzas are recurrent in the elaboration of principles. A principle is not invalidated by its overextension, although such a *reductio ad absurdum* is a favorite tool of political argument.

Nor is it true to say that the social rights, especially those associated with the freedom from want, are "Communist." As already mentioned, Marx and Engels had little use for the tradition of natural or any other rights. They considered them a bourgeois prejudice. This view has not prevented their adoption and incorporation into the constitutional documents of Communist states. In these documents they form part of the general function of such constitutions: to furnish a facade of principles. All constitutions have, of course, this function to perform to some extent. The func-

10. Art. 24 of the Universal Declaration.

tion of a constitution is to provide a myth[11] as much as a charter of operational rules or a bill of rights. Still, the elaboration of these social rights in genuine constitutions is the result of protracted struggles by particular groups and minorities for equality and freedom. These rights are not "Communist," but represent a response to a new and different situation of men frustrated by technological innovation and the like. Even so, the right to work goes back to the great Revolution in France; a number of these rights have appeared in constitutions of the American states; and they are found in many constitutions of the period after World War I, more especially the Weimar Constitution.[12] Indeed, it has recently been argued that the formulation and enforcement of these newer human rights is a central concern of Western as much as Eastern, of non-socialist as well as socialist societies. Thus both Italy and the Federal Republic of Germany have included in their recent constitutions most of the economic and social rights which the Universal Declaration contains.

Recognizing these rights as true rights must not prevent their being seen as different from the older rights. In order to appreciate fully this difference between the three sets of rights, as evolved in the history of the last three hundred years, it is necessary first of all to determine what they have in common. If one takes these three rights: the right to one's religious conviction, the right to vote, and the right to work—three rights that illustrate the freedom of independence, the freedom of participation, and the freedom of crea-

11. See especially W. Y. Elliot, "The Constitution as the American Social Myth," in *The Constitution Reconsidered,* ed. C. Read (1938). This author does not, however, use the term "myth" in the pejorative sense often associated with it. See also Friedrich, *Constitutional Government and Democracy* (1950), chap. ix, "The Constitution as a Political Force." The myth attaches especially to the founding of the constitutional order; see Friedrich, *Man and His Government,* (1963), chap. v.

12. See Gerhard Anschütz, *Die Verfassung des Deutschen Reiches . . . ein Kommentar* (14th ed.; 1933), esp. pp. 505 ff. and the literature cited there.

tion, invention, and innovation—one finds that like the corresponding freedoms these rights are all meant to enable a human being to become a rounded self, a fully developed person. Not to be allowed to believe what one does believe, not to participate in choosing one's ruler and to change him at regular intervals, not to be active in the sphere in which one could produce and create anew—every one of these deprivations is readily recognized as dehumanizing, as crippling the man so afflicted and preventing him from being a person in the full sense. That it may be difficult to implement such rights, even after they are proclaimed, does not invalidate them, any more than the failure to claim a right makes it disappear. The rights which the Negroes now claim in the United States have been theirs for a long time and the claims are based upon this very fact. Rights have an objective existence; they flow existentially from the very nature of man, as do the freedoms which correspond to them. For these freedoms are the manifestation of the power of human beings, of their capacity to put them to some account. There no doubt exists a wide range of difference between individual human beings in this capacity, but all men are capable of religious conviction, of voting, of working—to stay with our illustrations. The fact that each of the rights may be expressed as a capacity, as a power of man to achieve self-realization, is the hard core of all rights. Hence we may say that the most comprehensive right is this right to self-realization, which has also been simply called the right to freedom.[13] Looked at in this perspective of the

13. This right is related to the freedom of self-realization, of course. This freedom was found, in the history of philosophy, to be one of three, the other two being the freedom of self-perfection and of self-determination; but we wish it to be understood to comprehend these other two, which should be included under it; for self-determination is involved in self-realization, looked at from the viewpoint of the acting self, and self-perfection is the special form which self realization takes in those human beings who are capable of the convictional thrust of a higher destiny. Cf. Mortimer J. Adler, *The Idea of Freedom* (1958), I, 606 ff., for the trichotomy.

individual, rights appear to be either self-preserving, self-asserting, or self-developing. Looked at in the perspective of the political order of the community, such rights are either rights apart from this political order of the community, rights within or toward the political order, or rights depending upon the political order. These classes of rights are not sharply delimited and cannot be precisely separated from each other. Consider, e.g., the right of property, which has undergone such a remarkable evolution in the course of the last 150 years.[14] It may be seen as either of the three rights: to be protected from government interference (no taxation without representation), to serve as the basis of voting, or to be protected against monopolistic competition (protection of small business, etc.). It is evident that the right to one's property, to the *suum* of the famous Roman triad, is a basic right, but property may involve any one of the three kinds of rights. As a consequence, even in the Communist political order it is beginning to be recognized as such.[15] Another reflection will serve to reinforce the insight into this interconnectedness of the three kinds of rights. A right may be legally recognized and deeply felt by the person deprived of it; yet the deprivation may be caused by a non-government powerholder and -wielder. In that case, what appears at first to be a right apart from the political order

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It has recently been interestingly commented upon by C. W. Cassinelli in a study entitled *Freedom, Control and Influence: An Analysis* (in press), esp. chap. i, iii. Cassinelli retains, however, the trichotomy and does not develop the notion that self-realization comprehends the other two. Quite contrary to these prevailing views Isaiah Berlin, *Two Concepts of Liberty* (1958), pp. 25 ff., would restrict "self-realization" to the concept of freedom of the idealist philosophers, as in fact a form of the doctrine of self-perfection.

14. Gottfried Dietze, *In Defense of Property* (1963), argues for the return to an earlier conception.

15. Yugoslav Constitution, arts. 23, 25. Cf. also the commentary by Edvard Kardelj, "On the Principles of the Preliminary Draft of the New Constitution of Socialist Yugosalvia," in *The New Yugoslav Law* (1962), esp. pp. 16-17. A distinction, meant to justify this development, is being drawn between "private" and "personal" property.

may turn out to be a right depending upon the political order. This is typically the situation of underprivileged minorities, such as the Negroes in the United States. Still another facet of this interconnectedness may be seen in the early recognition of the right to education, at a time when generally prevalent thought dwelt on natural rights of independence. Thus we find John Adams writing that "liberty cannot be preserved without a general knowledge among the people, who have a right, from the frame of their nature, to knowledge." This right to education, now generally included among the economic and social rights, and surely a right depending upon the political order, was even then by this conservative New Englander described as an "inherent and essential right," a right, that is, one which was established "even before parliament existed."[16] Often the rank order of and distinction between the different rights is relative to the status of the particular person in the social order. The inherent right to an education is for a wealthy person a right *apart from* the political order, while for the poor one it is a right depending upon the political order. Thus a right to education may be recognized and yet not be effective in a community where much of the best education is offered in universities with very high tuition, unless scholarship funds are made readily available for underprivileged persons without discrimination. Much of the present struggle over desegregated educational opportunities for Negroes is similarly related to the neighborhoods in which Negroes live and where facilities are inferior to standards maintained elsewhere.

Thus the problem of Negro education is first of all one of equal facilities. Although rapid progress has been achieved toward the "closing of the gap," a great deal remains to be done and it is a problem by no means restricted to the

16. Cf. Page Smith, *John Adams* (1963), I, 79.

South. The issue transcends, however, that of facilities. In a famous decision the Supreme Court of the United States unanimously held that "separate educational facilities are inherently unequal," because "to separate them [Negro children] from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be overcome."[17] Not only in providing facilities, but in securing equal access to all schools the government may have exacting responsibilities in enforcing the rights of the weaker against the stronger.

Such active role of the government (state) is also recognized as needed in the economic sphere. The neo-liberals in Europe,[18] like the progressives in the United States, have been stressing the importance of firm government action to cope with the threats to freedom and man's rights resulting from monopoly power. Beyond that, the government must be able to assert its authority when facing the interest groups that press upon it from all sides. Yet in granting the government this position of a powerful arbiter mediating the conflicts of interest, neo-liberals are not prepared to abandon their basically critical attitude toward it. Government is needed to maintain freedom, but vigorous restraints are

17. *Oliver Brown v. The Board of Education of Topeka*, 347 U. S. 483 (1954) thereby over-ruling the decision of *Plessy v. Ferguson* (1896), which had established the principle of equal but separate education. The situation existing under that principle is admirably analyzed and put into context by Gunnar Myrdal (with Richard Sterner and Arnold Rose), *An American Dilemma* (1944), chap. xli. See also the discussion in *The Report of the United States Commission on Civil Rights* (1959), and the helpful abridgment, entitled *With Liberty and Justice for All* (1959), esp. Part III, pp. 101-137. The rapid progress which is being made in equalizing facilities can be gleaned from SERS, *Southern Schools: Progress and Problems* (1959), especially the valuable statistical material; see also the special issue of the *Harvard Educational Review*, Summer, 1960, entitled "Negro Education in the United States."

18. For this movement and its literature, see my article "The Political Thought of Neoliberalism," *American Political Science Review*, XLIX (1955), pp. 509 ff.

needed to contain the rulers within the bounds of a constitutional order which protects human rights.

Neo-liberalism, by stressing the role of the government in the maintenance of freedom, contributes its share to an understanding of the fact that all rights are political in the sense of depending upon the political order for their maintenance and enforcement. They are political, however, in the further sense of depending upon the values and beliefs of the political community which the order serves. Many of the newer rights are evidently the corollary of fairly recent developments; thus the right to work could be generally recognized only when industrialization created large-scale unemployment. Still, it would be a mistake to make this the ground for asserting that this right came into being only at that point. Rather, the assertion of the right is rooted in the belief that it is part of man's nature to work and that therefore any situation which deprives him of fulfilling this natural propensity ought to be corrected.[19] This reflection reinforces the important insight already mentioned that rights are normative in the sense that they reflect a tension between what is and what ought to be. From this vantage point, it can be seen that a right is related to an aspect of human nature which is being inhibited or thwarted. Such tension may be felt by those who are the victims of such torts or they may not. But whether they are or are not is not determinative. Established rights which have become conventional are often shrouded in forgetfulness until some dramatic issue projects them into the full glare of publicity.

The failure of men everywhere to appreciate the rights which they possess, or indeed to know about them, creates great obstacles to their enforcement. For unless complaint is made and insisted upon, the law enforcement authorities are likely to let sleeping dogs lie. A United States Supreme

19. See n. 9 above for references.

Court Justice has recently argued that individuals have less and less recourse to any corrective remedy against those who hold positions of power.[20] This statement perhaps exaggerates somewhat the sound point that serious injustice may develop and continue to prevail, because of the ignorance or indifference of the underprivileged.[21]

The consequences of ignorance and intimidation are even more serious where parts of the established government are violating or participating in the violation of human rights. Totalitarian governments apart, in many countries, where rights, liberties and freedoms have only recently become constitutionally recognized, they have remained largely paper declarations. It might be invidious to mention particular instances, but not one of the countries which have adopted constitutions since World War II has a satisfactory record of enforcement of its constitutional bill of rights. Rare are the instances where the public has been ready to take a vigorous stand.

A special aspect of this range of problems is the question of "states' rights" under federal systems. In these systems, the question of human rights, whether of broad or limited scope, is often argued in terms of a juxtaposition of states' rights. Especially in the United States, but also in relation to the United Nations Declaration, it is argued that the rights of individual men must yield to the rights of collectivities. There seems to be a good ground for such an assertion, in so far as history has shown and daily experience confirms considerable variations in what are believed to be basic rights. Rights, we have seen, are closely linked to the conception of man in particular communities. Hence each political community must and will determine their range and rank order in accordance with their values and beliefs. But this argument is

20. Mr. Justice William O. Douglas in Cahn, ed., *op. cit.*, p. 149.
21. For an elaboration of this point, see the article cited in n. 1.

rather superficial. It fails to take into account the fact that any particular local manifestation of such rights is embedded in the broader and more basic conception of these rights as belonging to human beings as such. Thus the United Nations Declaration aspires to state what are now universally recognized as the rights of all men, and the same may be said of the European Declaration for all Europeans. The argument applies a priori to all Americans who together constitute one political community. Local variations may be admissible within the broad context of such rights as flow from the freedom of expression, but they may not take the form of a denial of the right. In other words, states' rights cannot be pleaded against human rights within a federal system, except where the constitution explicitly permits local diversity. In case of doubt, the presumption must be in favor of the human right, because in the United States man is considered more important than the state.

But there are, of course, limitations to any right, especially that of possible hurt to another. As the United Nations Declaration puts it: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others. . . ."[22] Had the Declaration left it at that, there could have been little objection; for a program of rights always raises the problem of responsibilities corresponding to rights. Freedom has traditionally been seen as limited by regard for the rights of others.[23] But actually the Declaration adds

22. Art. 29.

23. Kant's formula is perhaps the most widely known, but it is also found in Locke and many others in similar forms; perhaps Kant's owes its fame to the explicitly imperative form: "Act so that . . ." *Die Metaphysik der Sitten* (*Immanuel Kants Werke*, ed. E. Cassirer, Vol. VII, Part I, *Rechtslehre, Einleitung*, p. 17). See also the comprehensive review by Mortimer Adler, cited above, n. 13. As a result, all attempts at stating the idea of freedom merely in terms of absence of restraints, impediments, or interferences by others have always foundered upon the rock of a moral

another limitation which might nullify all effective rights. It goes on to say that the exercise of such rights is limited by "the purpose of meeting the just requirements of morality, public order and the general welfare in a democratic society." In view of the different conceptions of democracy, ranging from Swiss constitutional democracy to the totalitarian system of Mao's China, it is evident that such terms as "public order" and "general welfare," not to mention "morality," are so vague in their implications as to enable the rulers to justify any limitation they see fit to impose. Indeed, these limitations are apt to render the rights nugatory.[24]

It is generally true that rights depend for their effectuation upon the marshaling of a certain amount of power, and it is such marshaling of power that the organizing of labor and of underprivileged racial minorities seeks to accomplish.[25] Demands for the enforcement of rights are apt to be futile unless they are organized demands; the power of the many lies in their capacity to organize. To the extent that that power is limited or restricted, their rights are likely

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objection: freedom ought not be equated with license. However, unless the abuse of freedom is included, freedom is at the mercy of anyone's self-proclaimed notions on right use. This is the difficulty that Felix E. Oppenheim, *Dimensions of Freedom,* (1961) seeks to deal with, as does Cassinelli in the work referred to above, n. 13.

24. Karl Loewenstein, *Verfassungslehre* (1959), pp. 153 ff. has developed the notion of a semantic constitution; in analogy one could speak of "semantic" human rights. See above, n. 12.

25. One need not go as far as Spinoza, who inclined to see the sphere of right and power as co-extensive, as is suggested by his well-known and often misinterpreted saying that "the big fish devour the little fish by natural right" (*Tractatus Theologico-Politicus* (1670), chap. xvi). But there is much concrete evidence of the correspondence between power and the enforcement of rights. Thus in his by now famous *Letter from a Birmingham Jail,* the Reverend Martin Luther King pointed out: "We have not made a single gain in civil rights without determined legal and non-violent pressure.... We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed." This letter has been reprinted in various journals; I have used the reprint in *The New Leader,* July, 1963. There is a remarkable similarity between this letter and some of the arguments in James Baldwin's *Nobody Knows My Name* (1954), esp. Part I, sections 3-6.

to remain "facade." Although significant remedial measures may at times be available by invoking the intervention of "higher" powers, these possibilities are limited. In most cases, therefore, the fuller implementation of recognized rights depends upon the power individuals can marshal through organization, whether for the purpose of effective pleading before courts, exerting pressure for needed legislation, or securing remedial action in the administrative field. Hence any political order which prevents individuals from organizing themselves for the defense of their rights *as they see them* is unlikely to provide adequate scope for the maintenance of such rights. The near impossibility of autonomously organizing groups of citizens in totalitarian orders testifies to the weakness of human rights in such states.[26]

At this point in the analysis a re-examination of the issue of freedom would be in order, since it is the positive aspect in so many of the new rights. Unfortunately, time and space do not permit it.[27] Suffice it therefore to point out that the shift of emphasis to freedoms stands in curious contrast to the actualities of the situation, which call for ever greater exertions on the part of public authorities to insure the effectiveness of these newer rights. How to combine these newer rights with those recognized earlier has become a serious problem everywhere. This problem cannot, as mentioned before, be solved in universal terms. As in the matter of freedom and its several dimensions, quantitative and qualitative issues are intermingled and only a soundly organized democratic process can hope to give satisfactory results. There can be little doubt that revision of the older constitutional systems is badly needed. Such innovation is

26. C. J. Friedrich and Z. K. Brzezinski, *Totalitarian Dictatorship and Autocracy* (1956), chap. xx and the literature cited there. There have been claims that freedom of association is increasing in some of the totalitarian states, notably Poland, but the evidence is scanty and unconvincing.

27. See C. J. Friedrich, *Man and His Government* (1963), chaps. xx and xxi for more extended treatment.

more likely to be achieved at the polls or in constitutional conventions than in courts. It is part of the political process to achieve them.

The American Bill of Rights is no longer adequate. Not only has there been a certain attenuation of older rights which need to be reaffirmed and strengthened,[28] but some of the new rights urgently require constitutional sanction. Thus the right to an adequate educaton, guaranteed in a number of the newer constitutions as well as the UN Declaration, ought to be positively affirmed in the United States Constitution. It would provide the courts with the necessary ground for coping with certain grave abuses, such as the withholding of education from broad classes of citizens, because of local dissatisfaction with the standards (desegregation) demanded under the Constitution. The right to be educated is possibly an even more important right than the right to be admitted to a particular school. Similarly the right to work, while promoted by much federal legislation, may be denied by state and local authorities when only their jurisdiction is involved. The problem presents itself in particularly poignant form in connection with the right to vote. The denial of that right through the handling of registration (discussed elsewhere in this chapter) appears to be an abuse, because the general right of participation in politics of which the right to vote is an important part is today universally acknowledged to be basic to a free community; how that right is being exercised, whether, e.g., through proportional or majoritarian representation, whether by people over twenty-one or over eighteen and such like questions may on the other hand well be left to local determination. Anyone comparing the traditional bill of rights derived from the eighteenth and nineteenth centuries with the modern

28. Mr. Justice Douglas has been among those who have called for this; see his essay in *Great Rights*, ed. Cahn, cited above.

bills of rights making full allowance for social rights will appreciate the need for radical revision.

But even when every effort is being made to reshape the constitutionally guaranteed rights in accordance with a wider and more adequate conception of human freedom, the problem remains of how to combine the several rights, liberties, and freedoms into a balanced and harmonious whole. This problem cannot be solved in arranging these rights, liberties, and freedoms into a rank list of simple priorities. The problem is not one-dimensional and static, but multi-dimensional and dynamic. It can only be solved in approximation and through adequate procedures for its resolution in response to specific situations and particular circumstances.

To return once more to the problem of the rank order of various rights, it has, in American law as well as other legal orders, been partially answered in terms of the sequence in which such rights occur. Thus the First Amendment has very generally been claimed to be the foremost and to contain those rights which are pre-eminent.[29] Dubious as this assertion must be considered, because a number of important rights are scattered throughout the original Constitution, including such crucial ones as *habeas corpus,* it does not eliminate the problem of rank order. The First Amendment itself contains *a number* of rights which may readily conflict with each other. For example, regulatory provisions protecting the individual's freedom of expression (speech) over the air may interfere with the private property rights of the owner of the broadcasting facilities. Not only property rights, but other rights may be in conflict. Freedom of the press clashes with the right of privacy, as well as the right to a fair trial and other rights;

29. *Everson v. Board of Education,* 330 U. S. 1, 1947; see also Alexander Meiklejohn, "The First Amendment Is an Absolute," *The Supreme Court Review* (1961), p. 255.

many other examples could be adduced, especially as between the older rights which are self-preserving and the newer rights which are self-developing. The reasons are not far to seek; for the former favor the well-to-do *beati possidentes,* while the latter favor the poor. It is in the very nature of such rights that they cannot be ranked in a fixed order, because the more or less in each case must be taken into account. "Situation sense" on the part of judges, legislators, and administrators will be required at all times; carefully elaborated procedures which make the cautious weighing of alternatives possible are the only way to secure maximum realization of all the different rights a civilized community may recognize as worthy of protection. Nor are judges necessarily the most vigorous guardians of human rights, though some judges at some times have rendered outstanding service.[30] In fact, no political authorities can be relied upon for such protection, unless an alert public is constantly on the watch and ready, individually and collectively, to insist upon the enforcement of the rights it recognizes as expressing the community's values, interests, and beliefs. The old saying that eternal vigilance is the price of freedom has lost none of its relevance, or has the evangelical assertion that "the truth will make you free." That truth is not given, settled, and final, but is set as a task.[31] In the ranking of rights, one cannot hope to arrive at a definitive settlement even for oneself; for

30. Benjamin Cardozo, *The Nature of the Judicial Process* (1921), was perhaps the first authoritative voice to question the overemphasis on the judiciary in American law; the literature on the subject since his day has become very extensive. See for an over-all consideration of the issues involved, Friedrich, *Man and His Government* (1963), chap. xxiv and the literature cited there.

31. In the last analysis, only the common man himself can be the guardian of his rights, the rights common to all men. What the intellectual needs to remember, and often does not, is that he too is a common man (that is to say a communal man as contrasted with the mass men) when he steps into the market place and participates in the affairs of the community. Cf. my *The New Belief in the Common Man* (1942), in which the destructive pessimism of Erich Fromm's *Escape from Freedom* (1941) is rejected, though the book was unknown to me at the time.

in a political community of any size it is out of the question that more be agreed upon than what rights to include in a general bill and a procedure for settling the issues as they arise, legislatively, judicially, administratively.

The question of rank order resembles in some respects the problem of how to balance rights against other considerations, such as those of security. As our preceding discussion has shown, these issues often are in fact conflicts over which right to give priority. Notably in the matter of security the right of protection, which has often been taken to be the most basic right, is involved. It is therefore not very useful to argue that there *are* "absolutes" in our Bill of Rights, and that "they were put there on purpose. . . ."[32] Nor does it prove the point to insist that they cannot be abridged on the ground that a superior public interest exists. For the question really is not whether the rights are absolute or relative to the public interest (though admittedly the argument is often cast in these terms). The question is rather whether any among the rights are to be preferred to others, and if so which ones. What the answer can be we have just shown.

But the argument about security and related problems raises another range of issues which may properly be called those of "constitutional reason of state."[33] They constitute a complex and difficult matter. It is troublesome in all constitutional democracies because of the challenge of totalitarian movements. Their camp followers are enemies of all constitutional order and yet they are regularly employing for the purpose of destroying the constitutional order itself, the rights made available *by* the constitutional order to its loyal citizens. For a constitutional democracy either to allow them

32. Thus Mr. Justice Black in *Great Rights*, ed. Cahn, esp. pp. 57 ff. Cf. also what is said above, n. 30.

33. See my *Constitutional Reason of State* (1957), for a more elaborate statement in the perspective of the history of political theory.

to do so or to outlaw them may become self-destructive. If such enemies of the constitutional order were only individuals acting for themselves, one could well afford to adopt the noble stance of Jefferson, who in his first inaugural said:

> If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.[34]

Would it were only a matter of opinion or that reason were free to combat it! Unfortunately constitutionalism has to deal with the agents of revolutionary world powers. They operate on the basis of a more deadly form of reason of state, namely, the "reason of party," which is grounded in a presumed certainty beyond all argument, dialectical materialism. How to cope with these challenges is a problem which no sentiment expressing eighteenth-century rationalism will enable one to solve. But neither can this problem be solved by more or less desperate appeals to an unqualified reason of state on behalf of the constitutional order. Since the protection and elaboration of human rights is the core of the constitutional order, its very reason for existing, every infringement of such rights ought to be justified by clearly stating the overt acts which constitute a clear danger and demonstrate its presence beyond the peradventure of a doubt. The British Public Order Act of 1936 is a model of such an approach, as it defined the particular acts, such as wearing a uniform, that were forbidden; it coped effectively with the threat of British fascism without outlawing opinions.[35] But not only judges and legislatures, but the learned professions of political science and law need to devote much more effort than they have in the past to reaffirming and strengthening

34. Thomas Jefferson, *Writings* (1859), Vol. VIII.
35. The British *Public Order Act* is dated Nov. 16; for the text see *The Law Reports* (1937), I, 60-67.

public understanding.[36] More especially should they insist that our police and military forces be taught, within the broad framework of their study of the social sciences, enough political theory to acquire a full understanding of the tradition of human rights and an appreciation of the difficulties of their enforcement.[37] Americans are not born with such understanding nor can the present state of affairs serve to give it to them. Therefore all Americans have every reason to be grateful to our minorities, groups and individuals, for the new vigor with which they are demanding the enforcement and invigoration of our rights.

But "constitutional reason of state" cannot be content with such educational efforts, important as they are. The various methods employed for coping with the problems of security and survival by administrative, legislative, and judicial modes of procedure are all inadequate. No security program should be left to ordinary legislation, let alone to administrative ordinance and discretion. It should be regulated in the constitution itself. There should be clear and adequate provision for constitutionally safeguarded emergency powers; if a particular right, such as the right to privacy or of the freedom of expression is believed to be too broadly stated, a suitable amendment should be undertaken, providing maximum security not only for the state but for the individual human being. Constitutional reason of state is in the last analysis a matter of ever more effectively ordering a government according to law. What Cromwell, Spinoza,

36. See the *Report* of Commission, cited above, n. 18, *passim*, for a broad and persuasive statement of the case.

37. This involves a candid appraisal of the role of the military in a free society, and a clear appreciation of the dangers of apolitical military forces. Only a military profession strongly rooted in an understanding of the constitutional order and its theoretical moorings can provide adequate security. Germany's error ought, at all costs, to be avoided, rather than made the basis of our approach, as was done by Samuel P. Huntington, in *The Soldier and the State* (1957), especially chaps. v and vi. Cf. *contra* Frederick Martin Stern, *The Citizen Army* (1957), who as a motto, cites George Washington: "When we assumed the soldier we did not lay aside the citizen."

and Kant knew, we have every reason to remember, since James Madison saw to it that it was embodied in our constitution, namely, that the core of a man's dignity is his conviction, his belief, his faith. To make this innermost self secure is more vital to the security and survival of a constitutional order than any boundary or any secret. For any community built upon the faith in human rights, the task of survival and of security becomes that of defending the innermost self as much as defending the outermost boundary.

As a conclusion, the following statement may serve to sum up this sketch of the humanist core of constitutionalism in an age when the religious foundations of constitutionalism have almost vanished. The development of human rights from natural rights through civil liberties to social freedoms has brought a striking ramification and extension of such rights. They are widely recognized as an essential part of a sound political order. In looking back over this development, defenders of human rights in theory and practice generally acknowldege that such rights now serve to define in constitutionally sanctioned terms those values which the political community cherishes. Hence their specific and detailed formuation will vary from community to community. These formulations contain, however, a common core: the recognition of man's self as a person possessing intrinsic dignity and hence entitled to an opportunity for fulfilling the potentiality of his being. The emphasis may shift from self-preserving to self-asserting and again to self-developing manifestations of the individual human being. Independence, participation, and creativity are universally valued, but their rank order is not fixed nor based on settled, absolute knowledge. Political communities will, therefore, differ in the degree to which they will leave each man alone in the pursuit of his happiness, allow him to participate in the

government or undertake in free association with fellow men what is needed for man's self-development.

All existing states fall short of living up to their professions of human rights. We do not yet possess detailed or precise knowledge of the causes of such failures and breakdowns. The fact that human rights are ever more universally recognized, even by those who seem least inclined to enforce them, is one of the distinguishing characteristics of our time. To the pessimist this universal recognition may signify a lack of serious concern; having become slogans, such rights are devoid of politically relevant content. But does it not perhaps justify the legal and political philosopher in hoping that human rights will gradually become more descriptive of the actual behavior and conduct of government? The foregoing analysis offers some ground for a reappraisal in either direction. Much will depend upon whether the building of an effective international community will succeed. Not only would it effectuate the basic right of self-preservation which is the ultimate condition of man's existence, but the freedom from the fear of war would produce the kind of relaxation in political relations, a reduction in the kind of emergencies which have ever served as grounds for the violation of human rights in favor of reason of state. Such hopes might, however, become chiliastic utopias, unless they are accompanied by the recognition of man's greater responsibilities as his rights increase. Neither optimism nor pessimism will do. The battle for human rights is a never-ending struggle: we need not hope in order to act, nor need we to succeed in order to persevere. It can be carried forward, if the belief in man which a transcendent justice calls for is maintained as part of the Western heritage.